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THE UNITED STATES-CANADA FREE-TRADE AGREEMENT

HEARING

BEFORE THE

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

THE UNITED STATES-CANADA FREE-TRADE AGREEMENT AND ITS EFFECT ON THE U.S. AGRICULTURE, ELIMINATION OF TARIFFS, AND IMPROVED ACCESS TO UNITED STATES AND CANADIAN MARKETS

MAY 24, 1988

Printed for the use of the
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THE UNITED STATES-CANADA FREE-TRADE AGREEMENT

TUESDAY, MAY 24, 1988

U.S. SENATE,
COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room SR-332, Russell Senate Office Building, Hon. Patrick J. Leahy (chairman of the committee) presiding.

Present or submitting a statement: Senators Leahy, Melcher, Conrad, Daschle, Boschwitz, Bond, and Wilson.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM VERMONT

The CHAIRMAN. The Senate Committee on Agriculture, Nutrition, and Forestry will come to order.

This is a hearing on the United States-Canada Free-Trade Agreement. I am glad to see so many people here. It is an important meeting. The Senators will be coming in and out during the meeting. We have the INF treaty on the floor and that will take up the time of several Senators.

I would note, though, that attendance so far this year and last year for that matter has been very good. As near as I can tell, every single hearing we have had and every single markup we have had has been attended by every member of the committee at one point or another during those markups and during those hearings.

But this hearing is to discuss the United States-Canada Free-Trade Agreement, and we are taking just one part of it, its effect on U.S. agriculture. A number of us sit on different committees. I know I am on at least one other committee that has jurisdiction over part of the agreement. I believe Senator Conrad is on another committee that has part of it and so on.

In fact, there are six committees in the Senate that have a coordinating role in the preparation of legislation needed to implement the agreement that we want before June 1.

This agreement, and I will just discuss its effect on U.S. agriculture, provides for elimination of tariffs over a 10-year period and will improve the access to both United States and Canadian markets for grains.

It is designed to work toward free and harmonized trade, and it is designed to end direct export subsidies into Canada or the

United States. Now much of this agreement is something that I find acceptable.

Other Senators may have some problems with it. But the reason I am predisposed to be in favor of it is because generally I favor the goal of expanding trade. Expanded trade, especially in agriculture, can lead to reduced stocks and government outlays.

I would like to see us put a lot of the idled lands we have in this country back into production. We should actually be opening, not closing, doors to more trade.

But I do not want to see any kind of agreement that sells our farmers short, that requires them to compete on a less than level playing field.

I want to give our farmers a way to expand their resources, and if you are going to talk about contraction of our agricultural sector, that should be a last resort. That should be after everything else has been tried and has failed.

We worked for over 2 years on a trade bill to help expand our agricultural exports. In fact, this committee, I believe, came out on the agricultural part of the trade bill, either unanimous or virtually unanimous, because we saw that it would put land back into production, put farmers back to work, increase their profits.

Now we understand that the President is going to veto it because he feels that workers should not know in advance when they are about to lose their jobs. I think this is terribly shortsighted. We have in most corporations golden parachutes for the executives, those who have enough money that losing their job is not going to really affect them. They are not going to lose their homes. Their children are not going to leave college.

But the President says he will veto the trade bill because those people who work on hourly wages should not get any kind of consideration, a few weeks in advance that they are going to have their plant closed, and they are going to lose their jobs.

Unfortunately, when he vetoes that, the opportunity to expand agriculture trade is going to be lost and the work of all of the Republicans and all the Democrats on this committee goes for naught, and the chance to greatly improve the agricultural sector and the agricultural economy will also be lost because I cannot imagine that we would be able to put back together the coalitions necessary to get another trade bill here. So that veto, I would just note, is going to be a substantial blow to the agricultural economy of this country and a lot of the advances will be lost.

But today our thoughts are not on the trade bill which will, unfortunately, be vetoed, but rather on this agreement. The goals of this agreement are laudable. But we cannot approve an agreement that will ultimately hurt our farmers and our agricultural industry. The concerns I have about the agreement revolve particularly around the way in which it is going to revise section 22 of the Agricultural Adjustment Act. And revising section 22 of the Agricultural Adjustment Act has to raise some concern.

Liberalized trade is risky. We open the door to import competition. Our job is to weigh that risk in light of the potential gain from expanded trade.

We have a distinguished panel here today to help us make this decision. Ambassador Alan Holmer, the Deputy United States Trade Representative, is here representing Ambassador Yeutter.

Deputy Agriculture Secretary Peter Myers is here. We also will have testimony from Frederick Ikenson, an attorney specializing in anti-dumping and countervailing duty law, and Kristen Allen, an economist with Resources for the Future, who has been researching the potential effects of the agreement. We have written testimony from other interested groups, and the record will be left open for 10 days for submission of statements.

Senator Conrad was here earlier than all of us this morning. I yield to him for an opening statement and then to Senator Boschwitz, whose involvement in these meetings is always of great interest to the chairman and sort of makes my day.

Senator BOSCHWITZ. I was going to comment on one of your comments, and I will do that in due course.

The CHAIRMAN. And so I will reserve my time to comment on your comment on my comment. Senator Conrad.

Senator CONRAD. Thank you, Mr. Chairman. I have a prepared statement that I would like to enter into the record at this point.

[The prepared statements of Senators Leahy, Conrad, McConnell, and Bond follow:]

Statement of the Honorable Patrick Leahy, Chairman
Committee on Agriculture, Nutrition, and Forestry
Hearing on the United States/Canadian Free Trade Agreement
May 24, 1988

We are meeting today to discuss the United States/Canadian Free Trade Agreement and its effect on United States agriculture.

The Agriculture Committee is one of 6 Committees in the Senate that has a coordinating role in the preparation of legislation needed to implement the Agreement. The Agreement has several provisions that are of interest to the agricultural community.

Specifically, the Agreement provides for the elimination of tariffs over a 10 year period. The United States and Canada exempt each other from the respective application of their meat import laws. Both parties agree to improve the access to their markets for grains. Canada agrees to remove its transportation subsidies for grain moving west for export into the United States.

Maybe even more important than these specific concessions, are the general commitments contained in the agreement. These commitments look toward free and harmonized trade between our two nations. The United States and Canada agree to stop subsidizing exports to each other, to work toward the reduction or elimination of trade distorting subsidies in agriculture, and to work toward harmonizing our respective rules governing sanitary and other restrictions on imports.

I will state frankly that I am predisposed to be in favor of this agreement. I am predisposed to favor any agreement that has the goal of expanding trade.

The expansion of trade will reduce our stocks and reduce government outlays. Expanded trade will help us put our idled lands back into production.

By opening rather than closing doors to more trade, we nurture the possibility that we can at some point let our farmers concentrate on expansion--not contraction.

We worked for over 2 years on a trade bill that would have helped to expand our agricultural exports. The President says he will veto it because he feels workers shouldn't know in advance that they are about to lose their jobs.

But today our thoughts must be on this Agreement. And as laudable as its goals are, we must take care not to approve an agreement that will ultimately hurt our farmers and our agriculture industry.

With each liberalization of trade comes a corresponding risk of harm from increased imports. It is our job to weigh that risk in light of the potential gain from expanded trade.

We have a distinguished panel here today to help us make this decision. I am pleased to welcome Ambassador Alan Holmer, Deputy United States Trade Representative and Deputy Agriculture Secretary Peter Myers.

We will also be receiving testimony from Fredrick Ikenson, an attorney specializing in anti-dumping and countervailing duty law, and Kristen Allen, an economist with Resources for the Future, who has been researching the potential effects of the Agreement. We have also received some written testimony from other interested groups which I will ask to be inserted into the record at the appropriate time.

SENATOR KENT CONRAD
Committee on Agriculture, Nutrition, and Forestry
Hearing: U.S.-Canadian Free Trade Agreement
May 24, 1988

I would like to commend the Chairman for calling these hearings on the U.S.-Canadian Free Trade Agreement. This agreement is one of the half-dozen most important issues this Congress will consider this year and the most important issue facing this Committee.

Indeed, I consider this agreement to be nearly as important as the agreement we reached with the Soviet Union on the reduction of Intermediate Nuclear Forces. Just as the INF treaty represents an effort to tear down barriers between ourselves and our largest military adversary, the Free Trade Agreement represents an effort to tear down barriers between us and our largest trading partner.

And I can assure you, the effects of the Free Trade Agreement will hit much closer for North Dakota farmers and energy producers than the INF treaty.

I believe in free trade and I believe that a North American free trade zone is long over due. The ideal free trade agreement should include the following:

First, an elimination of tariffs between the two countries and the establishment of a common external tariff agreement -- a customs union if you will.

Second, the agreement should provide for the systematic elimination of nontariff barriers.

Third, the agreement should provide for the elimination or, at the very least, a coordination of industry subsidies.

Fourth, the agreement should provide rules for the trade of services and intellectual property.

Finally, the agreement should provide consultation and coodination of exchange rates and the policies that affect exchange rates so that neither nation may take advantage of the elimination of tariffs.

In the abstract, the notion of free trade is highly desirable, particularly when our largest trading partner is involved. But we must work to assure that the abstract notion of free trade creates the reality of fair trade.

No matter how laudable the goals of the Free Trade Agreement, no matter how desirable the notion of open borders, we must assure that the hopeful ideal of free trade does not become a harsh reality of unfair trade for American farmers, auto workers, energy producers, and manufacturers.

This agreement, of course, falls far short of the ideal. It does eliminate tariffs between the U.S. and Canada -- an important step and a positive example for the rest of the world. The agreement also sets up rules for the trade of services -- again, an important precedent for our talks at the GATT negotiations.

Having failed to reach the ideal, this agreement may be, and hopefully is, an agreement that will benefit both nations overall. That is what we must each decide after a careful review and study of the provisions.

Concerning agriculture, several issues are of special importance. To put these issues in context, it is important to understand how very different the U.S. and Canadian farm programs are. The U.S. program, whether we like it or not, is primarily a supply management program. The Canadian farm program is designed to move their grain to export terminals and to get the best possible price for their farmers.

To illustrate the difference in these programs, I direct your attention to these two charts.

CHART I is an index of U.S. and our competitors exports. I chose the 1980/81 marketing year as the base year. As you can see while the U.S. suffered a major market loss in the 1980s -- which we are now regaining, our competitors have increased their exports by about 30%.

CHART II is an index of U.S. and our competitors levels of production. Again, I have chosen the 1980/81 crop year as the base. While the U.S. program is designed to cut back production in years of surplus stocks, the Canadian program and those of our other competitors are not. While U.S. production in the past few years is down more than 10 percent from 1980, Canadian production is up, as is that of our other competitors.

Like it or not, the effect of our current program during periods of surplus is to reduce U.S. production while our competitors increase theirs.

Important elements in controlling domestic U.S. prices, particularly in wheat, barley and oats, are the CCC loan programs, storage provisions, and the use or threat of Section 22 of the Agricultural Adjustment Act of 1933. Until the last few years, for example, wheat imports into the U.S. were close to zero. Last year and the first months of this marketing year, the U.S. experienced an influx of Canadian wheat, particularly durum which came in at a rate equal to 15% or more of the U.S. market.

What is particularly disturbing about this trend is that it occurred at a time that the U.S. had ample supplies of wheat including durum, at a time when the CCC was conducting massive sales of wheat from their stocks, and at a time when nearly three-fourths of U.S. wheat needed EEP to be exported at all.

It is clear that if all barriers to Canadian wheat imports to the U.S. were removed, that our supply management program will draw in Canadian wheat particularly during times of world surplus -- at a potentially high cost to our farm program.

The Canadian Free Trade Agreement does not eliminate our ability to use Section 22, but it does erect an additional hurdle for the use of our Section 22. We will explore this more thoroughly in the hearing as we discuss Article 705 of the agreement.

Second, the Canadians reserved the right in Article 705, paragraph 1.a. to require U.S. grain exported to Canada to be accompanied by an end-use certificate. No provision was made for equal treatment for Canadian grain exported to the U.S. I have some suggestions on this which I will raise later in the hearing.

Third, Article 701, paragraph 3, prohibits either government or government sanctioned agency from exporting agricultural products to the other country at below the cost of acquisition plus storage and handling costs. This provision was intended to prevent our Commodity Credit Corporation and

Canada's Wheat Board and other government sanctioned monopolies from subsidizing exports.

As in any business, there is an incentive to dump surplus products at below cost to avoid the costs of holding the product for an additional year.

Again, I will have a proposal to monitor the sales of the CWB in the U.S. without revealing the proprietary information of the Wheat Board. It is my understanding that the Department of Agriculture agrees with the principle and that all that remains is to work out the precise language.

Finally, I would note that Canada has an expansive program of subsidies for the production of a whole range of agricultural products. Because of this, it is extremely important that the U.S. countervailing duty (CVD) and anti-dumping (AD) laws continue to be effective under this agreement. We are fortunate to have an expert witness testifying today on these issues.

In closing, I would like to urge my colleagues to carefully study and consider the Canadian Free Trade Agreement in the coming months. While I have heard that some are urging cursory consideration of the CFTA and a quick vote by mid June, that seems to me to be both imprudent and irrational. As the Administration has stated many times, this is an historic agreement and, as such, deserves careful consideration in both houses of Congress.

There is much at stake in this agreement. The future of our trading relationship with Canada, one of our best friends in the international community and our largest trading partner, will be tested during our coming debate.

But I submit to you that what is also at stake is the economic future of millions of farmers, workers, and employers across the United States. We must not forget these people as we work toward the achievement of free and fair international trade.

Thank you, Mr. Chairman.

Charts I and II follow:

CHART I

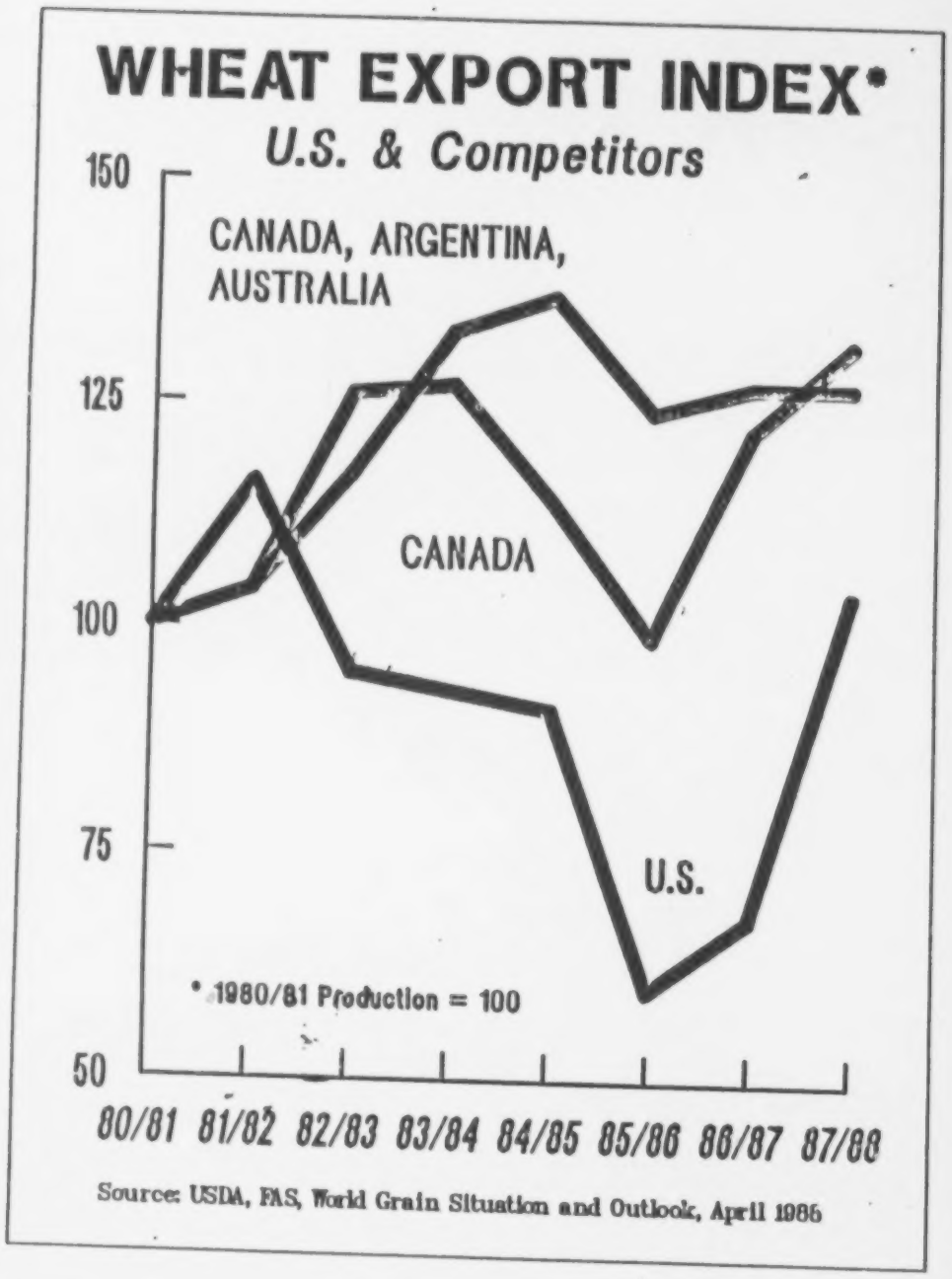
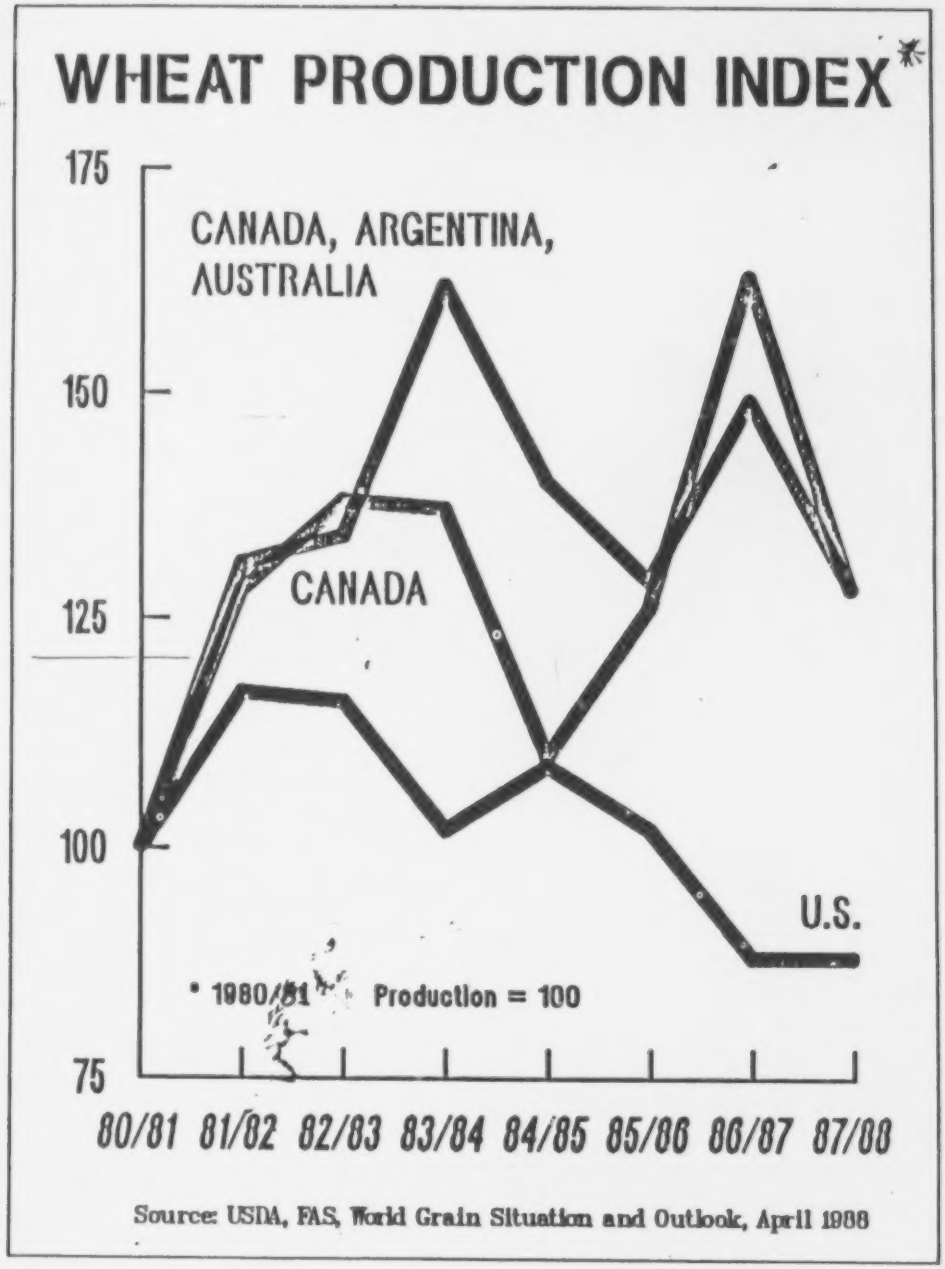

WHEAT EXPORT INDEX*
U.S. & Competitors
150
125
100
75
50
CANADA, ARGENTINA, AUSTRALIA
CANADA
U.S.
* 1980/81 Production = 100
80/81 81/82 82/83 83/84 84/85 85/86 86/87 87/88
Source: USDA, FAS, World Grain Situation and Outlook, April 1986

CHART II



Source: USDA, FAS, World Grain Situation and Outlook, April 1988

STATEMENT OF SENATOR MITCH McCONNELL
HEARING TO DISCUSS THE AGRICULTURE SECTION OF THE CANADA FTA
MAY 24, 1988

Mr. Chairman:

To begin, I would like to commend the Distinguished Chairman of the Agriculture Committee for holding this hearing to discuss the agriculture title of the U.S.-Canada Free Trade Agreement. This is certainly one of the most important issues which this committee has faced this Congress.

Canada is our largest trading partner, and agriculture is a key component of our trade with each other. I find the goals of the agreement laudable--I firmly believe that, if placed on equal ground, this country's farmers can compete with any in the world. Unfortunately, they cannot compete with the treasuries of most countries in the world. The FTA's efforts, along with the broader thrust of the current round of GATT negotiations, in working to reduce trade barriers between our nations do our farmers a service.

That is the ideal. I think it is incumbent upon us to ensure that the goal is actually met, and that in the zeal to get an agreement we do not bargain ourselves out of markets upon which our farmers depend. We must ensure that the field we put our players on is level, and not tilted by unfair trade barriers we might negotiate ourselves into accepting.

To be specific, I have been contacted by several indivduals concerned about various aspects of the FTA. Wheat growers, potato producers and egg producers have all expressed some serious reservations about various aspects of the agreement. I do understand that they are working very closely with the Administration on the Statement of Administrative Action to ensure that their concerns are addressed. I am hopeful this effort will be successful, and that all farmers are allowed a forum to air their concerns and express their views.

I appreciate this opportunity to hear the comments of my colleagues, and to listen to the testimony of the witnesses called before us today.

I thank the Chair.

STATEMENT BY SENATOR CHRISTOPHER S. BOND (R-MO.)
MAY 24, 1988

Mr. Chairman, for the past two years, the United States and Canada have worked very hard to negotiate the terms of a historical bilateral trade agreement. Early this year, President Reagan and Prime Minister Mulroney formerly signed the result--the United States/Canadian Free Trade Agreement. Although the Agreement has been criticised for not eliminating all existing barriers, it will undoubtedly result in more liberalized trade between our two great countries.

Although the Agriculture Committee will play only a minor role in the consideration of this Agreement, it is important that we analyze closely those provisions which will affect our fragile agricultural economy. As this Committee is well aware, United States farm policy has become synonymous with increased competitiveness in world markets. Nationwide, agricultural exports are responsible for almost a million jobs, and the output from over one in four cropland acres is destined for foreign markets.

In fiscal year 1987, the United States exported approximately $1.8 billion worth of agricultural commodities. Historically, Canada has imported commodities such as vegetables, grains, oilseeds, animals and animal products. During the same year, Canada replaced Mexico as the second largest exporter to the United States with sales totaling approximately $2.2 billion. The primary products coming from Canada are live cattle, beef, veal, pork, breads and pastry products.

In addition to expanding trade between the United States and Canada, the Agreement can be viewed as somewhat of a model for the Administration's trade proposal presented at the Uraguay Round. An example of success will make it easier for other countries to support a multilateral trade agreement which eliminates international market distortions.

Mr. Chairman, John F. Kennedy once said:

> "Geography has made us neighbors. History has made us friends. Economics has made us partners. And necessity has made us allies. Those whom nature hath so joined together, let no man put asunder. What unites us is far greater than what divides us."

These words have held true over time, and the implementation of the United States/Canadian Free Trade Agreement will be a great step toward ensuring this partnership in the future.

STATEMENT OF HON. KENT CONRAD, A U.S. SENATOR FROM NORTH DAKOTA

Senator CONRAD. I would like to turn to just a part of my prepared statement to set part of the discussion.

In this agreement, several issues are of special importance for the agricultural sector.

One of the things I want to concentrate on is the difference between the United States and the Canadian farm programs because that has special significance in evaluating the free-trade agreement.

The U.S. program, whether people favor it or not, is primarily a supply management program. The Canadian farm program is designed to move their grain to export terminals and to get the best possible price for their farmers.

To illustrate the difference between the programs, I direct your attention to these two charts.

The first chart is an index of U.S. and our competitors exports. I chose the 1980–81 marketing year as the base year. As you can see, while the United States suffered a major market loss in the 1980's which we are now regaining, our competitors increased their exports by about 30 percent. And I think this chart shows dramatically how the two systems have differed very significantly in terms of resulting exports.

The second chart is an index of U.S. and our competitors levels of production. Again, I chose the 1980–81 crop-year as the base. While the U.S. program is designed to cut back production in years of surplus stocks, the Canadian program and those of our other competitors are not. While United States production in the past 2 years is down more than 10 percent from 1980, Canadian production is up, as is that of our other competitors.

Again, Mr. Chairman, these charts are designed to highlight the very substantial differences between our system and our competitors system.

Like it or not, the effect of our current program during periods of surplus is to reduce U.S. production while our competitors increase their production.

Important elements in controlling domestic U.S. prices, particularly in wheat, barley and oats, are the CCC loan programs, storage provisions, and the use or the threat of the use of section 22 of the Agricultural Adjustment Act of 1933. Until the last few years, for example, wheat imports into the United States were close to zero. During the last year and the first months of this marketing year, the United States experienced an influx of Canadian wheat, particularly Durum, which came in at a rate equal to 15 percent or more of the U.S. market.

What is particularly disturbing about this trend is that it occurred at a time that the United States had ample supplies of wheat, including Durum, at a time when the CCC was conducting massive sales of wheat from their stocks, and at a time when nearly three-fourths of U.S. wheat needed EEP to be exported at all.

It is clear, Mr. Chairman, that if all the barriers to Canadian wheat imports to the United States were removed, our supply man-

agement program will draw in Canadian wheat, particularly during times of world surplus—at a potentially high cost to our farm program.

The Canadian free-trade agreement does not eliminate our ability to use section 22. I want to be clear about that. We are not making the assertion that it does. But it does erect an additional hurdle for the use of our section 22. We will explore this more thoroughly in the hearing as we discuss article 705 of the agreement.

The second issue I would like to discuss is that the Canadians reserved the right in article 705, paragraph 1(a) to require United States grain exported to Canada to be accompanied by an end-use certificate. No provision was made for equal treatment for Canadian grain exported to the United States. I have some suggestions that we will propose later on this matter which hopefully we can adopt.

Third, article 701, paragraph (3) prohibits either government, or a government-sanctioned agency, from exporting agricultural products to the other country at below the cost of acquisition plus storage and handling costs. This provision was intended to prevent our CCC and Canada's Wheat Board and other government sanctioned monopolies from subsidizing exports.

As in any business, there is an incentive to dump surplus products at below cost to avoid the costs of holding the product for an additional year.

Again, Mr. Chairman, I will have a proposal to monitor the sales of wheat by the Canadian Wheat Board into the United States without revealing the proprietary information of the Wheat Board. It is my understanding that the Department of Agriculture agrees with the principle, and that all that remains is to work out the precise language.

Finally, Mr. Chairman, I would note that Canada has an expansive program of subsidies for the production of a whole range of agricultural products. Because of this, it is extremely important that the U.S. countervailing duty and anti-dumping laws continue to be effective under this agreement. We are fortunate to have an expert witness testifying today on these issues.

In closing, I would like to urge my colleagues to carefully study and consider the Canadian Free-Trade Agreement in the coming months. While I have heard that some are urging a cursory consideration of the CFTA and a quick vote, I think that would be imprudent. As the administration has stated many times, this is an historic agreement, and, as such, deserves careful consideration in both houses of Congress.

I would, Mr. Chairman, refer back to what the President said repeatedly with respect to the INF agreement: trust but verify. Mr. Chairman, I would suggest to all of the members of this committee that those words are watchwords for the Canadian Free-Trade Agreement; trust but verify.

We have many things that we need to verify before we go forward with this agreement. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Conrad. And I should note that at some point I am going to have to be going out for another meeting, and I know you have offered to take over the Chair when that happens. Senator Boschwitz, you wish to speak to us now.

STATEMENT OF HON. RUDY BOSCHWITZ, A U.S. SENATOR FROM MINNESOTA

Senator BOSCHWITZ. Do not leave now, Mr. Chairman.

The CHAIRMAN. I would not. Wild horses would not drive me from here.

Senator BOSCHWITZ. Well, Mr. Chairman, I would like to go back to those charts and talk about them just a little bit. You said in your opening statement liberalized trade is risky.

I have always understood from my farmers that give us a level playing field, and it is important that we look at this treaty to see that a level playing field really comes about, give us a level playing field, and they will, indeed, do well. And I believe that.

I believe that American agriculture can be competitive and that it will be competitive. Mr. Chairman, you and I were over in Europe together, and there we encountered the Europeans. They do not want a level playing field because quite clearly, on a level playing field, they are not going to be competitive. Our principal deterrent to establishing that field and establishing more of an element of free trade, is the Europeans, not the Canadians. People cannot reasonably maintain that Canada subsidizes or provides more incentives to its producers than we do on a whole. That certainly is not the case.

The wheat production index, if you will go back to the export chart.

Senator CONRAD. The export index chart.

Senator BOSCHWITZ. If you start in 1981 the problem was not so much that competitors produced more. Competitor production, particularly in the case of the Argentines is very small compared to ours. Even in the case of the Canadians, production is perhaps 40 percent or less of the production that we have, though they, of course, have a much smaller population.

In 1981, we started to raise the loan rates. The loan rates on wheat got up to, if you include the interest on the loan, nearly $4. No wonder. No wonder that farmers in other countries decided they would produce more. If we are foolish enough to have set-asides—we are the only country in the world that does—we should not expect them to follow those kind of examples on our part.

The reason for our loss of trade is the fact that we priced ourselves out of the market. It is as simple as that. I look upon the Canadian Free-Trade Agreement as being questionable about whether or not it really promotes free trade. It is riddled with all kinds of exceptions, and I wonder exactly how free the trade is going to be.

As in all of these trade agreements, the most difficult provisions always deal with agriculture because agriculture is far and away the most protected aspect of our economic system.

Quite clearly, the Canadians have higher barriers to our goods than we do to theirs. If there really is a reduction of barriers, we should do OK. I approach this Free-Trade Agreement on the basis of wanting to like it, very frankly, Mr. Chairman.

I think that liberalized trade is desirable. Certainly, I would say that it is risky, too. Everything is risky in life, but it is a risk worth taking. It is particularly a risk worth taking because I think

our farmers in this country and the infrastructure of agriculture in this country is such that we will be able to compete on the world markets. The sooner there is a reduction in restraints to trade, as soon as there is a reduction of various subsidies to produce, we will be better off.

I thank you for holding this hearing, and I think it will be very useful and I look forward to it.

The CHAIRMAN. Thank you very much, Senator Boschwitz. Senator Daschle.

STATEMENT OF HON. THOMAS A. DASCHLE, A U.S. SENATOR FROM SOUTH DAKOTA

Senator DASCHLE. Thank you, Mr. Chairman. I too would like to commend you. I think this is probably going to be one of the most important things we address in this committee this session, and I think that it is going to be especially crucial to those States who are represented here at the committee this morning.

I am in concept a very strong supporter of the idea of a free-trade arrangement with Canada. The question that still continues to trouble me is whether or not one can have free trade by eliminating duties and tariffs but retaining subsidies.

We have a real concern about the implication of subsidies with regard to free trade and whether or not we can actually establish that in the context of the agreement that we have today.

If we can, then truly we have accomplished something. If we cannot, we will have set back the whole notion of a free trade relationship with Canada, far more significantly. And so I hope that we can resolve that matter and be confident that through our work in the Finance Committee and the Agriculture Committee both, we can address subsidies, we can accomplish our task of ensuring that over a short period of time—I am thinking a few years—we will come to some agreement with regard to subsidies themselves.

The other concern I have relates to subsidies obviously, and that is the question of how restrictive the Free-Trade Agreement will be with regard to future changes in anti-dumping and countervailing duty statutes.

I wish we would have passed the trade bill, and that concern would have been eliminated. Since we have not passed the trade bill, and since today we are likely to hear that there will be a veto, that there has been a veto, the implications with regard to anti-dumping and countervailing duty statutes become all the more profound to me.

So we are going to take a good look at this and hopefully come to some conclusion with regard to its implications to the Free-Trade Agreement. So this hearing is important in that regard as well, and I again thank the chairman and commend him for holding the hearing.

The CHAIRMAN. Thank you very much. Senator Melcher, unless you have an opening statement, I was going to invite Ambassador Holmer and Deputy Secretary Myers to join us down there at the microphones.

Senator MELCHER. Yes, I think we might as well go right on into the hearing.

The CHAIRMAN. Fine.

Mr. MYERS. Mr. Chairman, I would also like to have our Associate Administrator of the Foreign Ag Service, Ann Veneman, here.

The CHAIRMAN. Of course. Ms. Veneman, good to have you here. Ambassador Holmer, glad to have you here, and I thought perhaps you might start out. Then we will go to Mr. Myers, and then we will come back for questions.

STATEMENT OF AMBASSADOR ALAN F. HOLMER, DEPUTY U.S. TRADE REPRESENTATIVE, WASHINGTON, DC, ACCOMPANIED BY CHIP ROH, GENERAL COUNSEL'S OFFICE, U.S. TRADE REPRESENTATIVE

Ambassador HOLMER. Thank you very much, Mr. Chairman. As an introduction I would like to thank you and the committee for the leadership that you have provided to us with respect to bilateral negotiations and also our multilateral Uruguay round negotiations.

I know, Mr. Chairman, the trip that you and Senator Boschwitz and others made to Geneva was very helpful from our perspective and very well-received and was useful by process.

I would also just note parenthetically in response to the comment made by Senator Daschle and yourself, Mr. Chairman, I just want to assure you the President wants to have a trade law in 1988, and we look forward to working with you as diligently as possible to attempt to achieve that in the remaining months.

The CHAIRMAN. Mr. Ambassador, just to interject there, just so everybody fully understands, so everybody fully understands on the trade bill—and I know that when the President speaks when he sends out the veto message w. h I guess is being timed for today for whatever appropriate reasons—I did not check my horoscope today. But whatever the reason for doing it today, I am sure that one of the things that will be said is that once this bit of protection for workers is removed, the Congress could then just simply pass one that the administration would accept.

I hope they understand it is not going to be that easy. It took 2½ to 3 years of strong negotiations to get this far. We have a package in there that will benefit American agriculture substantially, and that is going down the tubes, and I cannot believe in the very few weeks left and the congressional schedule this year that we will get another trade bill put back together, and while that will affect different people in different sectors of the country different ways, speaking as chairman of this committee, I think we have lost a golden opportunity to do something for American agriculture in this.

I do not mean to drop all that on you, Mr. Ambassador. You are not the one doing the veto, but those who think this is just a simple public relations game down at the White House ought to know that a great deal of negotiation went in this. A lot of give and take, a lot of work by both Republicans and Democrats in the House and the Senate to get to this compromise, and on the agriculture part. I cannot believe that we could put all of this back together again into a trade bill this year.

And that is a golden opportunity lost. That was on my time and not on your time, so go right back.

Senator BOSCHWITZ. Well, on my time, Mr. Chairman, I want to respond.

The CHAIRMAN. What makes you think you have any? [Laughter.]

Senator BOSCHWITZ. I am going to vote to sustain the President's veto on the trade bill, and very frankly I do not object very much to the plant closing provisions. I think they are not particularly difficult to cope with.

I must tell you, Mr. Chairman, as a businessman, I used to go to 40 or 50 plants a year to see my suppliers or potential suppliers. When I walk into a kitchen cabinet factory or a carpet mill or a lumber or plywood factory, I can tell you in 10 minutes if it is going to close in a year or two.

There are no surprises in these kind of things. I am not offended by a 60-day notice provision at all. If that factory is improving its machinery and modernizing its equipment and retraining its workers and caring for the premises, it is not going to close.

And if it is not doing those things, it will probably close and everybody in town knows it. So the 60 days, 90 days, what is the difference? It is not an appropriate provision in a trade bill, in an omnibus trade bill that is supposed to make us more competitive, but nevertheless plant closing is not a provision that is particularly onerous as far as I am concerned.

The rest of the provisions are, however, including some of the agricultural provisions. I do not see what is so great about provisions that are going to create new barriers because of pesticides and other types of things. We are the principal users of those kind of pesticides and chemicals in the world, and we are going to penalize ourselves a great deal.

I am not so impressed with the agricultural provisions of that bill, I must respectfully say to my chairman, and I am going to vote against the bill whether they take that 60-day notice in or out. If all the major trading nations in the world pass such a bill, what would be the effect on world trade? I do not think there is any question that world trade would contract and that people's lives would not be improved but quite the reverse, and that the world would suffer as a result.

The CHAIRMAN. We want to continue this debate. I think the fact that virtually every major farm organization in the country strongly endorsed the agricultural parts of it means that they feel differently. But now having said that, we will let Mr. Holmer and Mr. Myers testify and none of us will, including the chairman, will interrupt. You do not have to leave, Rudy. I mean——

Senator BOSCHWITZ. Having said that.

The CHAIRMAN. Well, as soon as Senator Boschwitz leaves, I have another statement I want to make. [Laughter.]

Well, he is coming back so I will not make it. Go ahead, Mr. Ambassador.

Ambassador HOLMER. Thank you, Mr. Chairman. We are here to talk about whether or not this agreement is a good deal or not for the United States. I think that Senator Conrad in his written and

oral statements put it about right. In his written statement, he said this agreement, of course, falls far short of the ideal.

I would not disagree with that. This agreement is not utopia. We think it has positive benefits with respect to agriculture and elsewhere, but clearly it is not utopia. Senator Conrad indicated that the committee should trust but verify. We look forward to your scrutiny and your verification, and we hope that you will conclude, as we have, that this agreement is good for the United States.

What we are going to do is Secretary Myers will talk specifically about the agricultural provisions, and I will speak to the other provisions of the agreement so we can just understand the overall context in which the agriculture chapter falls.

This is an agreement that is truly stunning in its scope. You are talking about $160 billion in bilateral trade in goods and services between the United States and Canada, two countries that are getting together to create the world's largest shared market, and clearly we think a win-win agreement for both United States and Canada.

I will review briefly the provisions of the agreement.

TARIFFS

Currently you have tariffs on the Canadian side of the border that are among the highest in the industrialized world averaging about 9 or 10 percent. You have tariffs on the U.S. side that average about 4 percent. Under this agreement, those Canadian tariffs and the U.S. tariffs all go to zero, across the board, no exceptions. We think that provides tremendous benefit for U.S. exporters. Currently, there is a $1.3 billion price burden on U.S. exports to Canada. That will be eliminated, and there are private studies that estimate that U.S. exports will expand by $2.6 billion per year to Canada.

INVESTMENT

With respect to investment, we are one heck of a lot better off under this agreement than before. Earlier, with respect to direct takeovers, Investment Canada did a review of those takeovers for companies that had assets of $5 million in value or more. That number, thanks to Secretary Baker's leadership, has been increased to $150 million with the net result that while currently 9,600 firms in Canada are subject to review, that number will go down to 600 firms, a 92 percent reduction.

And what we have probably, most importantly, in the Investment Chapter is that the Canadians are precluded from going back to their restrictive investment regimes that they had in the 1970's.

ENERGY

A big, big plus in this agreement, particularly in the agricultural arena. What we attained was nondiscriminatory access to Canadian energy supplies. We believe that cheaper and more secure energy will make U.S. industries more competitive both in North America and around the world, and it will prevent the Canadian Government from reimposing the restrictions and discriminatory

pricing practices that hurt the United States both industrial users and consumers in the late 1970's and the early 1980's.

SERVICES

With respect to services, presently we have a relatively open situation in Canada and the United States with respect to services. This agreement locks that in. With respect to Government procurement, the agreement will make U.S. companies now eligible for an additional $500 million in Canadian Government procurement, and will require Canada to create a bid protest procedure and tighten the rules regarding eligibility for bidding.

DISPUTE SETTLEMENT

With respect to dispute settlement, my understanding is that you will have some additional testimony about that later today and it is a subject that Senator Daschle raised in his opening remarks. What the Canadians wanted in this agreement is either an exemption from our dumping and countervailing duty laws or a wholesale rewrite of those laws.

We insisted, we said absolutely no way. That it was inconceivable to us that if we did agree to that deal, we thought there was no way that the Congress would approve of that. And our discussions since then, I think, have verified the wisdom of that U.S. position.

But we insisted that those laws not be changed by the agreement, and the way it is going to work in the future is the process that the Department of Commerce and the International Trade Commission will work exactly the way it has before. The only change will be that if a party wants to appeal that decision, it will go to a binational panel.

But that panel will only apply U.S. law as written by the Congress of the United States, as reflected in the statute, the legislative history, the regulations, the administrative practice, and prior court decisions that have been made.

And it is important to remember that the United States is not the only country of these two countries that has dumping or countervailing duty cases against the other. Indeed, if you look at the statistics since 1980, while there have been 30 United States dumping or countervailing duties against Canadian exports to the United States, during that same time period there have been 43 Canadian dumping and countervailing duty cases against United States exports.

Those Canadian decisions will now be subject to review by the binational panel. We also anticipate that the binational dispute settlement process will work much more quickly than United States courts do presently.

AUTOMOBILE AREA

There are a whole host of improvements made in the automobile area that I would be happy to review if anyone likes. There are a number of protections that we believe we have in the agreement that will protect us against continued Canadian subsidies practices.

This is an issue that Senator Daschle had raised in his opening comments, and there is also language that has been approved by

the Senate Finance Committee and the Ways and Means Committee that would also address that issue.

OTHER ISSUES

The agreement paves the way for recognition by Canadian authorities of U.S. testing facilities and bodies. It removes Canadian embargoes on imports of used motor vehicles and aircraft. It removes significant Canadian discrimination faced by United States financial institutions.

It facilitates the temporary entry of business persons into Canada. It requires compensation to owners of U.S. television programs. It provides a new tough rule of origin to prevent circumvention.

We have safeguarded our right to retaliate if Canada takes actions in the cultural area that harm our commercial interests. My hope, Mr. Chairman, is that after we have today's discussion about wheat and other aspects of the agricultural chapter that, one, I hope that we can persuade you that modest as it is, this agreement is favorable, as far as U.S. agriculture is concerned.

WILL THIS AGREEMENT MAKE OUR COUNTRY A BETTER AND MORE PROSPEROUS PLACE?

But I hope you can also take a step back and ask yourselves will this agreement make our country a better and more prosperous place to live a year from now, a decade from now, a century from now?

Our judgment is that the answer to that question is a resounding yes, and we hope that you will reach the same conclusion. I am pleased to be able to report, Mr. Chairman, that we have had a whole series of very favorable consultations and negotiations with the various congressional committees.

WORK OUT ACCEPTABLE LANGUAGE

Just last week, we were able to work out language acceptable to the administration and also acceptable either to the Ways and Means Committee or the Finance Committee in the areas of eggs, autos, oil import fees, plywood, rules of origin and meat transshipment, steel, wheat, fish, surges under section 201, subsidies, ethyl alcohol, zinc alloys, fresh fruits and vegetables, conditions on entry into force, and many, many others.

The result of all that was that the agreement was reported unanimously, or the implementing legislation was unanimously approved by the Senate Finance Committee and the Ways and Means Committee. We were quite pleased with that obviously, but we do want to work cooperatively with this committee to try to work out implementing legislation that will be acceptable to all parties. Thank you, Mr. Chairman.

[The prepared statement and a summary of the United States-Canada Free-Trade Agreement of Ambassador Holmer follow:]

TESTIMONY OF

AMBASSADOR ALAN F. HOLMER

DEPUTY UNITED STATES TRADE REPRESENTATIVE

BEFORE THE

SENATE COMMITTEE ON AGRICULTURE

MAY 24, 1988

Thank you for the opportunity to testify before you today on the U.S.-Canada Free Trade Agreement.

The signing of the Free Trade Agreement on January 2 by President Reagan and Prime Minister Mulroney culminated almost two years of complex negotiations. It is no exaggeration to say that this is a truly historic document. This Agreement will substantially increase trade and investment opportunities in both the U.S. and Canada. As President Reagan said, "This historic Agreement will strengthen both our economies and over time create thousands of jobs in both countries."

These negotiations were characterized by hard bargaining and difficult compromises. Many will seek to identify winners and losers, but that approach is too narrow. This is a win-win Agreement. It should result in increased economic activity, higher trade levels, more jobs, and enhanced competitiveness for both the United States and Canada. The people of both countries

will benefit from this Agreement, through lower prices and greater consumer choice.

The U.S.-Canada Free Trade Agreement is the most comprehensive bilateral trade agreement ever negotiated. As the world's largest trading partners, we are constructing the world's largest shared market. We have submitted to the Committee today an extensive summary of the Agreement. Therefore, in my formal statement I will only highlight its main provisions.

Let me begin by discussing the area of primary interest to this committee -- agriculture. Both the United States and Canada entered these negotiations knowing full well that the achievement of our major trade objectives for our agricultural sectors require multilateral solutions. Without discounting the importance of bilateral trade with Canada, it is fair to note that for both Canada and the United States the larger challenges and opportunities for our exports of many commodities lie with third countries. Accordingly, we have agreed to work together in the Uruguay Round to liberalize agricultural trade and address the complex issue of agricultural subsidies.

Nevertheless, the U.S.-Canada Free Trade Agreement includes provisions providing U.S. and Canadian agricultural interests increased opportunities to market their products. In particular, all agricultural tariffs between the U.S. and Canada will be

eliminated within 10 years. U.S. producers of fresh fruits and vegetables stand to benefit the most from reductions in the high Canadian duties on those products. Chiefly because of Canadian fears of U.S. competition in these products, we agreed to a mechanism allowing either party to temporarily impose import fees when the other country's prices are below 90 percent of the average monthly price in recent years and provided the planted acreage for the product has not increased. In no case can fees or duties exceed the normal tariff for other countries, and any fees must be eliminated if prices rise above this 90 percent trigger, and in any event within 180 days.

Even with this fee mechanism - which the United States can also invoke - we believe the FTA provides a significant advance over the current situation, where our exporters face not only high MFN duties but the further risk of a surcharge on top of those duties. In most circumstances, we will enjoy duty-free treatment on products in which we are very competitive.

The Agreement also liberalizes a number of agricultural nontariff barriers. Canada has agreed to eliminate import licenses for U.S. wheat, barley, oats and -- most importantly -- products processed from these grains, when U.S. government support for the particular crop is equal to or less than that of Canada.

Canada has also agreed to increase its import quotas for eggs and poultry. Although Canada applies its quotas on a global basis, U.S. exporters should have a competitive advantage over other potential supplying countries because the U.S. alone will benefit from the elimination of egg and poultry duties.

The Agreement eliminates virtually all Canadian discriminatory policies affecting sales of U.S. wine and distilled spirits. Those products will be treated the same as Canadian products in the application process for goods to be sold in provincial liquor stores and in the distribution system. Discriminatory markups on U.S. wine, one of the biggest obstacles, will be phased out by the end of 1994, with half the price discrimination to be eliminated by January 1, 1990. Any discriminatory pricing practices on distilled spirits must be eliminated by January 1, 1989.

In general we have retained our right to impose "Section 22" restrictions on agricultural imports from Canada. The U.S. has agreed not to introduce import restrictions on products from Canada containing ten percent or less sugar for purposes of protecting the sugar price support program, but we otherwise retain our rights under Section 22 pertaining to sugar containing products. Both countries have reserved the right to introduce or reintroduce restrictions on grains in the event of a significant increase in imports resulting from a substantial change in the support programs of either nation.

Both countries have agreed to exempt each other, in most circumstances, from import quotas applied under our respective meat import laws. However, if necessary to prevent frustration of restrictions imposed on meat from third countries, either country can restrict imports from the other country if the other country is not imposing equivalent restrictions on third countries. Finally, we have agreed to work together to harmonize, to the greatest extent possible, technical regulations affecting agricultural, food, beverage and certain related goods.

As I indicated earlier, the problems of agricultural subsidies are global in nature. The U.S. and Canada have agreed to work together to eliminate all subsidies which distort agricultural trade through multinational negotiations such as the Uruguay Round. In the FTA, we have agreed not to use export subsidies on agricultural goods exported to the other country. Canada will cease granting export subsidies under the Western Grain Transportation Act (WGTA) which have benefitted Canadian exporters (primarily of feed) to the U.S. through West Coast ports. The Agreement does <u>not</u> restrict existing rights of either country to grant domestic subsidies, so WGTA subsidies on products shipped east from the prairie provinces can be maintained as long as they also apply when the product is consumed in Canada.

The Parties have expressly agreed that their public entities, such as Canada's Wheat Board, will not sell agricultural goods in the other country at a price below the acquisition cost plus handling, storage and other costs. We believe this latter provision will be an important discipline against unfair pricing by the Canadian Wheat Board, and we intend to monitor compliance very carefully.

Outside of agriculture, much progress was also made.

Under the Agreement, we have eliminated all tariffs between the United States and Canada. Since Canadian tariffs are, on average, twice as high as comparable U.S. rates, total tariff elimination will provide significant benefits for the U.S. exporter.

For the first time since services became a major international commercial issue, two major trading partners have negotiated an agreement establishing rules for bilateral trade in services. We also concluded the first bilateral agreement with any other country covering the entire financial sector.

We are establishing much freer and more secure trade in energy. The energy provisions are particularly important for farmers, for whom the oil shocks of the 1970's were particularly painful. The Agreement calls for nondiscriminatory access for the United States to Canadian energy supplies and secure market access for

Canadian energy exports to the United States. Our approach is market-oriented. This means that the Canadian Government will not be able to impose higher prices on us than they charge Canadians. Cheaper and more secure energy supplies will make U.S. industries more competitive, both in North America and throughout the world.

Also for the first time, the United States and Canada have agreed to rules governing bilateral investment activities. The Agreement reduces the screening of U.S. investment in Canada, and moves Canada towards a more open, market-oriented investment environment.

The question of how to apply countervailing duty and antidumping laws was one of the most difficult to settle. We finally agreed to retain existing national laws and procedures dealing with subsidies and dumping. But final decisions taken under those laws may be appealed to binational dispute settlement panels upon the request of either party.

There are also provisions covering automotive trade, alcoholic beverages, customs matters, government procurement, product standards, personnel movement, and many other areas. These are all described in detail in the summary we submitted to the Committee today.

The proposed Agreement spans many sectors of our economies. We expect numerous industries and groups to mobilize strong support. Nonetheless, we recognize that, despite widespread enthusiasm for this Agreement, some may disagree. For some, there may be too much free trade in this Free Trade Agreement. Some special interests will see themselves as vulnerable to increased competition in a free trade area. Others may be timid, afraid to try a creative approach to the future, fearful of the unknown, thinking that no change means no risk. Yet in this dynamic, interdependent world of ours, the future inevitably holds risks, and the status quo is never sustainable. To do nothing is to retrogress.

Then there are those who are disappointed because they wanted more and wanted it now. Unfortunately, some entered these negotiations with unrealistic expectations that the negotiations would cure all their ills. This Agreement is not a panacea for every ill. It will reduce, but not end, trade frictions. It will minimize, but not eliminate, trade distortions. There never has been, and likely never will be, perfectly free trade between any two independent sovereign countries. This Agreement was never intended to solve all our bilateral trade problems and should not be expected to do so. By establishing dispute resolution and consultation mechanisms, the agreement explicitly recognizes this fact.

Failure to implement this Agreement would have devastating repercussions for both countries. The United States and Canada would clearly miss out on a once-in-a-century opportunity. We would be deprived of the enormous economic gains which will come from this Agreement as well as the intangible benefits of developing an even closer relationship with our friendly neighbors to the north.

We would also lose the impetus it gives to the new GATT round. If the United States and Canada -- the two largest trading partners in the world, next door neighbors, the closest of friends and allies -- cannot liberalize their trading relationship, what hope do we have of success in Geneva?

The question on both sides of the border should be "will this Agreement make my country a better and more prosperous place to live a decade or a half century from now?" The objective answer to that question will be a resounding yes!

We must keep our eyes squarely on the long-range benefits for each nation as a whole. This Agreement will help both Americans and Canadians enter the 21st century more competitive and better prepared for the future.

We should approve this Agreement and then build on it in the future. It will, without doubt, be the most significant bilateral trade agreement either country has ever negotiated.

Summary of the United States-Canada Free-Trade Agreement follows:

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

SUMMARY OF

THE U.S.-CANADA FREE TRADE AGREEMENT

February 1988

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THE WHITE HOUSE

Office of the Press Secretary
(Palm Springs, California)

January 2, 1988

STATEMENT BY THE PRESIDENT

I am pleased to announce that Prime Minister Mulroney and I have today entered into an agreement to establish a free trade arrangement between the United States and Canada.

In the truest sense, this is an historic agreement for both sides. We will strengthen what is already a deep friendship between our people by enhancing economic opportunities and creating jobs in both countries. Moreover, the agreement firmly establishes that the trade environment between the two countries will in the future be founded on the principle of free and open trade.

This comprehensive agreement will benefit many sectors of the U.S. economy. Canadian and American tariffs will be phased out completely, saving consumers hundreds of millions of dollars while also improving our export opportunities. It will secure access to Canada's market for American manufacturing, agriculture, financial services, and high technology; improve national security through energy sharing; and provide important investment opportunities. Canada will benefit from the agreement in many of these same ways; the pact is truly reciprocal. As the agreement goes into effect, Canada's access to our large domestic market will grow, and Canadian industrial centers will gain opportunities to develop even more important roles in the economy of North America.

The agreement to establish a free trade area has important international implications as well. It will encourage supporters of free trade throughout the world by demonstrating that governments can remove trade barriers even in the face of protectionist pressures. We hope that the U.S.-Canada example will help set the tone for the Uruguay Round multilateral trade negotiations.

Our negotiations with the Canadian government leading to this agreement incorporated advice from Congress, industry, agriculture, and labor. Our Congress, as well as the Canadian Parliament, will review the agreement fully over the next several months. As this process begins, both sides should be mindful that the decisions they make will help shape the relationship between our

MORE

countries in the years to come, and will send a signal to the rest of the world.

The creation of the world's largest free trade area will be a mark of leadership and presents an historic opportunity to the United States and Canada. We must not let this opportunity slip from our grasp.

# # #

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 2, 1988

FACT SHEET

U.S.-CANADA FREE TRADE AGREEMENT

The United States and Canada have entered into a free trade agreement that, if approved and implemented, will take effect on January 1, 1989. The agreement will:

- Eliminate all tariffs on bilateral goods trade within 10 years of implementation;
- Reduce nontariff trade barriers;
- Establish principles for the conduct of bilateral trade in services;
- Establish rules for the conduct of bilateral investment;
- Resolve many outstanding bilateral trade issues;
- Enhance the energy and national security of the two countries;
- Facilitate business travel; and
- Establish a timely bilateral dispute settlement mechanism.

Economic Implications

Each year the U.S. and Canada exchange more goods and services than any two countries in the world. Bilateral trade in goods and services exceeded $150 billion in 1986.

The elimination of tariffs and most other barriers to trade between the two countries will increase economic growth, lower prices, expand employment and enhance the competitiveness of both countries in the world marketplace.

Chronology of the Negotiation

- In March 1985, President Reagan and Prime Minister Mulroney asked their trade officials to explore ways to reduce and

eliminate existing barriers to trade between the U.S. and Canada.

- On September 26, 1985, Prime Minister Mulroney formally requested that the U.S. and Canada examine the potential for negotiating a comprehensive free trade agreement.

- On December 10, 1985, President Reagan notified the Congress of his intent to enter into bilateral negotiations with Canada using "fast track" procedures.

- On June 17, 1986, U.S. and Canadian negotiators on the free trade area met for the first time in Ottawa.

- On October 3, 1987, President Reagan notified Congress of his intent to enter into a free trade agreement with Canada.

- On December 9, 1987, U.S. and Canadian negotiators initialled a final text of the agreement.

- On January 2, 1988, President Reagan and Prime Minister Mulroney signed the final text of the agreement.

The Fast Track

Section 102 of the Trade Act of 1974 authorizes the President to enter into bilateral free trade agreements and to have the Congress approve them on a "fast track" basis. Section 102 authority expires at midnight on January 2, 1988.

In order for a bilateral agreement to qualify for fast track consideration, several conditions must be met:

- The negotiation must be requested by the foreign country;

- The President must notify the House Ways and Means and Senate Finance Committees of the negotiations, giving them 60 legislative days advance notice;

- The President must notify the Congress of his intent to enter into an agreement 90 days before doing so.

After entering into an agreement, the President must submit it to Congress, along with a draft implementing bill, a statement of any administrative action proposed to implement the agreement, an explanation of how the bill or statement changes or affects existing law and a statement of reasons why the agreement serves the interests of U.S. commerce and why the bill and proposed action are required and appropriate.

The implementing bill is introduced in both Houses of Congress on the day it is submitted and is referred to the committees of jurisdiction. House committees have 45 days in which the House is in session to report the bill; they are discharged automatically from further consideration after that period. The House votes within 15 days in session after the measure has been received from the House committees.

After receiving the bill from the House, the Senate committees have 15 days in which the Senate is in session to report the bill; they are discharged automatically from further consideration after that period. The Senate votes within 15 days in session after the measure has been received from the Senate committees.

Amendments to the bill are not in order. A simple majority of each House is required for approval.

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BRIEF SUMMARY OF KEY FTA PROVISIONS

- Tariffs: Eliminates all tariffs on U.S. and Canadian goods by 1998.

- Rule of origin: Uses a rule of origin to prevent third country goods from receiving FTA tariff treatment.

- Customs: Ends customs user fees for goods and duty drawback programs by 1994 for bilateral trade and duty waivers linked to performance requirements by 1998 (except for the Auto Pact).

- Quotas: Eliminates import and export quotas unless allowed by the GATT or grandfathered by the FTA.

- National treatment: Reaffirms GATT principle preventing discrimination against imported goods.

- Standards: Prohibits use of product standards as a trade barrier and provides for national treatment of testing labs and certification bodies.

- Agriculture: Eliminates all bilateral tariffs and export subsidies and limits or eliminates quantitative restrictions on some products, including meat. Eliminates Canadian import licenses for wheat, oats and barley when U.S. crop price supports are equal or less than those in Canada.

- Wine and Distilled Spirits: Removes most discriminatory practices against wine or spirits imported from the other country.

- Energy: Prohibits most import and export restrictions on energy goods, including minimum export prices. Requires any export quotas used to enforce short supply or conservation measures to share resources proportionately. Provides for Alaskan oil exports of up to 50,000 barrels per day to Canada.

- Autos: Replaces and Canadian content rule for duty-free Auto Pact imports into the U.S. with tougher FTA content rule. (Most auto trade already is duty-free under the U.S.-Canada Auto Pact.) Does not change rules for Auto Pact-qualified companies importing duty-free into Canada, but does not allow new companies to qualify. Permits U.S. auto and parts exports that meet the FTA rule to enter Canada at FTA tariff rates, which phase out over 10 years. Ends all Canadian duty remission programs for autos by 1998.

- Emergency action: Allows temporary import restrictions to protect domestic industries harmed by imports from the other country in limited circumstances.

- Government procurement: Expands the size of government procurement markets that will be open to suppliers from the other country.

- Services: Commits governments not to discriminate against covered service providers of the other country when making future laws or regulations. (Exempts transportation services.)

- Temporary Visas: Facilitates travel for business visitors, investors, traders, professionals and executives transferred intra-company.

- Investment: Provides national treatment for establishment, acquisition, sale and conduct and operation of businesses. (Exempts transportation.) Commits Canada to end review of indirect acquisitions and to raise to C$150 million (in constant 1992 Canadian dollars) the threshold for review of direct acquisitions. Bans imposition of most investment performance requirements.

- Financial Services: Exempts U.S. bank subsidiaries in Canada from Canada's 16 percent ceiling on assets of foreign banks. Ends Canada's foreign ownership restriction on U.S. purchases of shares in federally regulated insurance and trust companies. Reviews U.S. firms' applications for entry into Canadian financial markets on the same basis as Canadian firms' applications. Permits banks in the U.S. to underwrite and deal in debt securities fully backed by the Government of Canada or political subdivisions. Guarantees continuation of multi-state branches of Canadian banks.

- General dispute settlement (except for financial services and countervailing duty and antidumping duty cases): Establishes a binational commission to resolve disagreements.

- CVD/AD dispute settlement (for countervailing and antidumping duties): Allows countries to continue to apply existing national laws. Replaces court review with a binational panel (when requested), which must apply national law in rendering decisions under international law.

- Softwood lumber: Preserves the 1986 agreement with Canada on provincial pricing practices.

- Culture: Exempts cultural industries from the FTA, but authorizes measures of equivalent commercial effect in response to actions otherwise inconsistent with the FTA.

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SUMMARY OF THE AGREEMENT

Preamble

The Preamble to the Agreement describes the two countries' desire to improve their economies, to achieve full employment and increase living standards and to strengthen the competitiveness of both countries' firms in the global marketplace.

PART ONE: OBJECTIVES AND SCOPE

The first part includes chapters setting out the objectives and scope of the Agreement and defining key terms.

Chapter One: Objectives and Scope

The Agreement establishes a free trade area (FTA) consistent with the General Agreement on Tariffs and Trade (GATT), the multilateral agreement governing trade relations between 94 countries.

The objectives of the Agreement are to:

- eliminate barriers to trade in goods and services between the two countries;
- facilitate conditions of fair competition;
- significantly liberalize conditions for investment;
- establish effective procedures to administer the Agreement and resolve disputes;
- and lay the foundation for further bilateral and multilateral cooperation.

The federal governments agree to ensure that state, provincial and local governments take necessary actions in areas under their jurisdiction to implement the Agreement. They establish that the Agreement generally will take precedence over pre-existing agreements, except where specified, and they agree to treat each other's goods, services and investment as they treat their own to the extent provided in the Agreement.

Chapter Two: General Definitions

Words critical to the application of the Agreement are defined.

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PART TWO: TRADE IN GOODS

Chapters three through twelve deal with trade in goods, building on the GATT and other agreements. Chapters three through six, eleven and twelve apply to all trade in goods. Chapters seven through ten apply to individual sectors.

Chapter Three: Rules of Origin for Goods

The Agreement will eliminate all tariffs between the U.S. and Canada, but each country will maintain its own tariffs on imports from other countries. Because of the disparities between U.S. and Canadian tariff levels, it is necessary to prevent imports from third countries from being shipped through one FTA partner into the other in order to escape the higher tariff.

Rules of origin are used to define those goods entitled to duty free treatment. Goods wholly produced in either the U.S. or Canada will qualify for FTA treatment. Goods containing imported inputs will qualify if they are processed enough to result in one of several specified changes in tariff classification under the internationally agreed Harmonized System; that is, they must be changed in ways that are physically and commercially significant. In some cases, there is the explicit requirement that at least half of the cost of manufacturing the goods must be attributable to Canadian and/or American materials and/or direct costs of processing. Finally, there is a safeguard provision denying FTA treatment to any goods altered merely to circumvent the rules of origin.

Goods that are further processed in a third country before being shipped to their final destination will not qualify for FTA treatment. For example, goods produced by either U.S.- or Canadian-owned maquiladora operations in Mexico will not qualify.

Apparel made from fabric woven in the U.S. or Canada will be duty-free but apparel made from imported fabric will qualify for FTA treatment only up to the following levels:

	Non-Woolen Apparel	Woolen Apparel
	(in million-square-yard equivalent)	
Imports from Canada	50	6
Imports from the U.S.	10.5	1.1

Non-woolen fabric and made-up textile articles, woven or knitted in Canada from yarn produced or obtained in a third country, will qualify for FTA treatment for three years, but only up to an annual level of 30 million square yards.

The two governments will consult regularly to ensure that the rules of origin are operating effectively and to consider changes to the rules where experience suggests changes may be helpful.

Chapter Four: Border Measures

The central element of a free trade area is the elimination of substantially all tariff and nontariff trade barriers.

Tariffs

All bilateral tariffs will be eliminated in stages by January 1, 1998. The removal of tariffs will increase two-way trade and lower costs to consumers in both countries, thereby creating a single U.S.-Canadian market of 265 million people. Approximately 75 percent of bilateral merchandise trade, currently in excess of $120 billion, already moves free of duty. The remaining 25 percent, however, is subject to tariffs. Canadian tariffs average about 9-10 percent, or about twice the U.S. average of approximately 4-5 percent.

The results of the tariff negotiation are expressed in terms of the new Harmonized System (HS) of tariff nomenclature. (If either country fails to adopt the HS, duties will be eliminated by converting the schedule of reductions back to current tariff schedules.) All dutiable products in the HS were assigned to one of the following three staging categories: (1) immediate elimination; (2) five equal, annual cuts (20 percent per year), and (3) ten equal, annual cuts (10 percent per year). In almost all instances, staging on a particular product is the same in both countries. The stages for various commodities were selected in recognition of the fact that industries in both countries will require varying periods of adjustment to changing competitive conditions.

Import-sensitive industries on both sides of the border were generally accorded 10-year staging, which would result in the duty being eliminated by January 1, 1998. These include plastics, rubber, most wood products, lead, zinc, base metal articles, footwear, textiles and apparel, steel, many alcoholic beverages, consumer appliances, precision instruments, watches and most agricultural and fish products.

Immediate duty elimination is scheduled for such products as automatic data processing and related equipment, certain telecommunications equipment, motorcycles, whiskey and rum, some processed fish, raw hides, leather and furs.

All other duties will be phased out by January 1, 1993. Included within this category are paper, furniture, printed

matter, chemicals, after-market automotive parts, precious jewelry, most machines, some musical instruments, and petroleum.

The Agreement provides that tariffs can be reduced faster whenever the two governments agree.

Customs Programs and Procedures

The Agreement eliminates duty drawback for bilateral trade, duty waivers linked to performance requirements (except as provided in the chapter on automotive trade), and the U.S. customs user fee for Canadian merchandise. It authorizes importers and exporters to certify that goods meet the rules set out in the rules of origin chapter and are therefore eligible for FTA tariff treatment. These measures are intended to prevent imports from third countries from benefiting from the FTA.

Duty Drawback: Both countries will end duty drawback on exports to the other as of January 1, 1994, with limited exceptions. Most countries, including the United States and Canada, have duty drawback programs, which provide for the return of duties on imports when they or substituted domestic goods are incorporated in goods subsequently exported. Because of the elimination of bilateral tariffs, continuation of duty drawback between the two parties would allow duty free-entry of third-country imports through the other FTA party and would distort trade and investment decisions.

As an exception to the ban on duty drawback for bilateral trade, the following goods will continue to benefit from the program:

- goods remaining in the same condition on exportation as on importation (but they would not benefit from FTA tariff treatment),

- dutiable goods of the United States or Canada if they are incorporated into, or directly consumed in, the production of goods subsequently exported back to the FTA partner, and

- goods where both parties agree to maintain duty drawback (this category consists of (1) imported citrus products and (2) fabric imported from a third country and made into apparel that is subject to the most-favored-nation (MFN) tariff when exported to the other party).

Also, beginning January 1, 1994, goods withdrawn from a Foreign Trade Zone (FTZ) or benefiting from a similar program will be treated the same whether destined for consumption in the U.S. or Canada. For a good made in a U.S. FTZ, duty must be paid on the value of any foreign components at either the component or

the finished-good tariff rate. Maintaining the full benefits of these programs, like duty drawback programs, would have allowed imports from third countries to enter duty-free through the other FTA party and would distort trade and investment.

Duty Waiver: Neither party will introduce new duty waivers or expand existing ones linked to performance requirements after the later of June 30, 1988 or the date of Congressional approval of the Agreement. Existing programs will be eliminated by January 1, 1998. This provision ends the trade-distorting practice of requiring a firm to buy local inputs or to export output in exchange for a tariff exemption.

The 1998 termination date excludes certain waivers affecting automotive trade, as specified in the section on automotive trade. The countries reserve existing rights under other agreements with respect to the Auto Pact or comparable arrangements. This provision maintains the U.S. right to challenge Canadian performance requirements under GATT rules.

If a party can show that a duty waiver to a specific firm granted on a commercial good hurts its commercial interests, then the party granting this waiver must either make it generally available to any importer or end the program. This provision prevents discrimination among firms.

Customs Fees: Starting on January 1, 1990, the U.S. must cut by 20 percent each year the customs user fee on goods qualifying under the rule of origin of the FTA. The fee on Canadian goods will be eliminated as of January 1, 1994. Neither country may introduce new customs user fee programs to pay for the costs of Customs administration on goods from the other country.

Customs Procedures: The Agreement authorizes the governments to require importers to submit a written declaration of origin based on a written declaration of origin provided by the exporter. It requires each country to make it unlawful for the exporter to provide a false certification. False declarations by either the importer or the exporter could be prosecuted by the government of the country in which the offending business is located. This provision will help avoid fraudulent claims of FTA origin to avoid tariffs.

The Agreement also provides for cooperation on enforcement, consultations on uniform application of the rule of origin, review and appeal procedures for decisions on the rule of origin and consultations on major changes affecting customs administration.

Import and Export Restrictions

Import and export quotas and other restrictions can distort trade flows. The elimination of such barriers is essential to an

effective free trade area. Unless specifically grandfathered by the Agreement or allowed by the GATT, existing quantitative restrictions will be eliminated immediately or according to a timetable. Some specified restrictions that have been exempt from GATT obligations will be eliminated for trade between the U.S. and Canada.

In all cases where quantitative restrictions are prohibited under the Agreement, use of minimum export prices and minimum import prices (except those used to enforce countervailing duty and antidumping orders) also are prohibited.

Where either country prohibits imports from a third country, it may similarly prohibit the pass-through of imports from that country through the FTA partner. This provision preserves the right to enforce embargoes for foreign policy or other reasons (e.g., embargoes against Cuba or Iran).

Export taxes will not be permitted under the Agreement unless the tax is also levied on goods destined for domestic consumption. In addition, where GATT-permitted export restrictions are applied (such as in the event of a short-supply emergency), the restriction must not reduce the proportion of the good that was exported to the FTA partner relative to the total supply of the good prior to the restriction.

Chapter Five: National Treatment

The Agreement incorporates the GATT requirement that, once imported into either country from the other, goods will not be the object of discrimination. This ensures that the elimination of border measures will not simply be replaced by internal measures favoring domestic goods over imports. This rules out higher sales or excise taxes or regulatory requirements on imports. Discrimination against goods from the other country by provinces or states is prohibited even if a province or a state discriminates against goods from other provinces or states.

Chapter Six: Technical Barriers

There are legitimate public policy objectives for which technical regulations and standards are maintained (e.g., to protect human, animal or plant life or health; to preserve the environment; and to protect essential security interests). However, standards measures may work to inhibit trade.

The Agreement builds on current obligations under the GATT Standards Code not to use standards to hinder trade unnecessarily. Certification and testing facilities will receive nondiscriminatory treatment in both countries. We also agree to work to harmonize

our standards where appropriate so that similar products do not have to be made or work in different ways in order to be sold in the other country. Provisions of this chapter do not apply to agricultural goods, which are covered in the chapter on agriculture.

These provisions do not mean that the U.S. will have to adopt the metric system or Canadian standards, or that standards cannot be adopted for legitimate regulatory reasons. The basic rule remains that standards must not create unnecessary obstacles to trade. Obstacles to trade are not created where the demonstrable purpose of standards-related measures is to protect health and safety, environmental, national security and consumer interests. However, such measures must not operate to exclude goods of the other country if they meet these objectives.

Both countries will assure that testing facilities and certification bodies are treated in a nondiscriminatory manner. This paves the way for the recognition by Canadian authorities of U.S. facilities and bodies. This does not require that all testing labs receive accreditation, especially if an individual lab is not qualified in the view of the accrediting authority, but forbids the discrimination against labs on the basis of nationality.

Canada and the United States agree to harmonize (make compatible) federal standards-related measures to the greatest extent possible, and to promote harmonization of private standards. The Agreement does not require that standards and technical regulations be harmonized but provides for it where appropriate. State and private standards-setting bodies are not obligated under any of these provisions.

Both countries will provide for enhanced transparency in the regulatory process. To this end, we will expand our information exchange and guarantee a 60-day comment period on proposed standards-related regulations at all levels. This is important to manufacturers because they need to know about regulatory changes which may affect their products so that they can prepare for the changes, and have some say in them. Similar provisions will apply for state, provincial, and private standards activities at a "best efforts" level.

Processes and production methods are included as standards-related measures subject to the provisions of the Agreement. This provision makes clear that specifying how a product is made is just as much a standards-related measure, and subject to the rules of this section, as specifying how the product should perform.

Both countries will recognize each other's systems for accrediting testing labs. Currently, this is a small program operated by the National Bureau of Standards in the U.S. and the

Canadian Standards Association in Canada to accredit testing labs. Labs accredited under one program will automatically receive recognition in the other country.

Chapter Seven: Agriculture

The U.S. and Canada agree that the achievement of our major trade objectives for our agricultural sectors will require multilateral solutions and accordingly will work together in the Uruguay Round and other fora to liberalize agricultural trade. Nevertheless, the FTA includes provisions providing U.S. and Canadian agricultural producers increased opportunities to market their products in the future with no tariff barriers and with fewer nontariff barriers.

Various barriers to trade in agriculture have arisen in recent years in an attempt to stabilize the agricultural economy. Quotas, import licenses, technical requirements and subsidies have all had a negative effect on trade in agricultural products. The Agreement provides for a number of liberalizing measures in an era of increasing protectionism.

The Agreement provides for semi-annual consultations between the U.S. and Canada on agricultural issues. It also provides that each country shall retain its rights and obligations under the GATT except as otherwise provided.

Tariffs

All agricultural tariffs between the U.S. and Canada will be eliminated within 10 years, thereby facilitating trade and leading to higher efficiency. The agricultural sectors likely to be most affected by the tariff elimination will be fresh fruits and vegetables because some of the highest agricultural tariffs are applied on those products.

Both countries will reserve the right, for 20 years, to apply a temporary duty on designated fresh fruits and vegetables to protect their domestic producers from import surges from the other country. This provision will facilitate a smooth transition to a tariff-free border for both countries, providing a mechanism to prevent unnecessary hardship to fruit and vegetable producers. The temporary duty can only be triggered if (1) the import price falls below 90 percent of the previous five-year average monthly import price for five consecutive days, and (2) the planted acreage in the importing country is not higher than the previous five-year average for the particular fruit or vegetable. The total duty applied under this provision cannot cause the total duty on these products to exceed the lesser of the most-favored-nation (MFN) duty that was in effect for the corresponding season prior to the Agreement or the then current MFN duty. Moreover,

it can be applied only once per year per product for no longer than 180 days. The temporary duty will be removed immediately once the import price exceeds 90 percent of the five-year average for five consecutive days.

Subsidies

The U.S. and Canada have agreed to work together to achieve, on a global basis, the elimination of all subsidies which distort agricultural trade through multilateral negotiations such as the Uruguay Round. This is consistent with the U.S. proposal for agriculture in the Uruguay Round. The FTA partners have agreed not to use export subsidies on agricultural goods exported directly or indirectly to the other country. Each country has also agreed not to sell agricultural goods in the other country at a price below the acquisition price plus handling, storage and other costs. This will prevent the use of practices such as dual pricing. The Agreement will not limit other forms of production subsidies in either country.

Canada has agreed to exclude from the transport rates established under the Western Grain Transportation Act (WGTA) agricultural goods originating in Canada and shipped via West Coast ports for consumption in the U.S. These subsidies were instituted by Canada in 1984 as an expansion of the Crow's Nest Act. It is anticipated that this will primarily affect shipments of millfeed and rapeseed meal into the U.S. Pacific Northwest. The Agreement will not affect WGTA subsidies on shipments through Eastern ports (Thunder Bay), which are not conditioned on export and have been in place since 1897.

These provisions do not prevent imposition of antidumping or countervailing duties.

Access Issues

Grains: Canada has agreed to eliminate import licenses for U.S. wheat, barley, oats and their products when U.S. government support for the particular crop is equal to or less than that of Canada. Each country will calculate its own support level in accordance with a methodology set forth in the Agreement. There is a mechanism to resolve any disagreement over the other country's calculation. When it occurs, the elimination of licenses will provide greater access for the U.S. to the Canadian market for both grains and processed products containing grains.

The Agreement will not affect the ability of either country to legislate changes in domestic support programs for agricultural products. Both countries have also reserved the right to impose or reimpose import restrictions on particular grains if imports increase significantly as a result of a substantial change in either country's support programs for that grain.

Meat: In evidence of the spirit of free trade, the two countries will exempt each other from import quotas applied under their respective meat import laws, unless those imports are frustrating import restrictions on meat imports from other countries. This is a further step ensuring access to each other's markets. This provision will not allow the transshipment or substitution of meat from third countries to circumvent the respective meat import laws. Direct third country access to the U.S. for meat will remain unchanged by the Agreement.

Poultry and Eggs: Canada has agreed to increase the base level for its import quotas for eggs, chicken, turkey and products thereof to a level reflecting total shipments over the last five years. This provision will increase the amount of guaranteed access into Canada. As a result of the tariff reductions, U.S. exporters should have a competitive advantage over other potential supplying countries for the increased quotas.

Sugar: The U.S. has agreed not to impose import restrictions on products from Canada containing ten percent or less sugar for purposes of restricting the sugar content of those products. This provision will not limit the ability of the U.S. to restrict the entry of processed products with higher than ten percent sugar content for purposes of protecting the sugar program.

Technical Regulations

The U.S. and Canada have agreed to work together to harmonize, to the greatest extent possible, technical regulations affecting agricultural, food, beverage and certain related goods. These provisions will facilitate trade for both countries by eliminating, where possible, technical requirements that can amount to non-tariff trade barriers. Specific schedules address the following areas: feeds; fertilizers; seeds; animal health; veterinary drugs; plant health; pesticides; food, beverage and color additives; packaging and labeling; meat, poultry and egg inspection; dairy, fruit and vegetable inspection, and unavoidable contaminants in food and beverages.

Chapter Eight: Wine and Distilled Spirits

Export opportunities for U.S. producers of alcoholic beverages have been limited by measures in Canada that discriminate against the internal sale and distribution of imported products in Canada. The Agreement does not prohibit the regulation of alcoholic beverages in either country, but does eliminate the most significant existing discriminatory practices in Canada and prohibit discrimination against the products of the other country for all new regulations.

Listing measures (limits on brands or types of products that may be sold) must no longer discriminate against wine or distilled spirits of the other country. The lone exception to this requirement is that the province of British Columbia may continue to grant automatic listing to certain estate wineries, provided that listing measures do not otherwise discriminate. Criteria for decisions on listings must be based on normal commercial considerations and listing measures cannot be used to create disguised trade restrictions. Further, listing measures must include procedures for a fair a expeditious appeal when an application for a listing is denied.

The Agreement requires the elimination of discriminatory pricing measures for wine and distilled spirits, including charging a higher markup for U.S. products than locally produced products. Any existing markups must be eliminated when the Agreement is implemented for distilled spirits and must be phased out by January 1, 1995 for wine (with half of the differential to be eliminated by January 1, 1990). Differential pricing measures may only be maintained if the differential between products of the two countries does not exceed the additional cost of service for imported products relative to domestic products. Any such cost of service differential will be subject to audit to ensure it reflects actual higher costs rather than arbitrary protection for local products.

The Agreement prohibits discrimination between Canadian and U.S. wine and distilled spirits in terms of the distribution system for these products. However, on-premise sales by a winery or distillery solely for items produced by them may continue. Private wine store outlets existing on October 4, 1987 in Ontario and British Columbia may continue to discriminate in favor of wine produced in those provinces, but distribution measures in those provinces must otherwise provide nondiscriminatory treatment. Quebec is also allowed to continue to require that wine sold in grocery stores must be bottled in Quebec, as long as alternative outlets for U.S.-bottled wine are provided.

Canada has also agreed to eliminate any measures which require that distilled spirits imported in bulk must be blended with Canadian spirits in order to be sold in Canada.

Canada will recognize Bourbon Whiskey as a distinct product manufactured in the United States and the United States will recognize Canadian Whiskey as a distinctive product of Canada.

Tariffs

Tariffs on whiskey and rum will be eliminated when the Agreement takes effect. Tariffs on other distilled spirits, wine and beer will be phased out in ten equal annual amounts so that duty free status will be obtained on January 1, 1998.

Chapter Nine: Energy

Energy is the single most important input for a developed economy. Without it, there could be no basic industries such as chemicals, steel and other primary metals, autos, aviation, and pulp and paper. All of these industries require energy as a key input and some also manufacture products whose use depends on the availability of energy. Thus, assuring secure supplies of energy at stable and reasonable prices is an essential priority of U.S. economic and trade policy.

The U.S. is the world's largest energy consumer. Although we are also one of the leading producers of energy, the requirements of our economy for various forms of energy are so great that we must import significant amounts of energy to meet these needs. Canada is by far our largest energy supplier. We import more crude oil and petroleum products from Canada than from Saudi Arabia, Venezuela or Mexico. Canada supplies almost all of our natural gas and electricity imports, and more than two-thirds of our uranium imports. In addition, Canada is our largest coal export market. The U.S. and Canada share the world's largest bilateral energy trade relationship, with two-way trade of $10 billion per year or more.

Regrettably, the history of this trade has been marked by a considerable degree of government intervention on both sides, in the form of export restrictions, minimum export price requirements, import fees and quotas, and various other trade restrictions. There have also been domestic programs in each country which have distorted trade both in energy itself and in energy-intensive products such as petrochemicals. While these past actions have often been in response to short-term concerns, they have generally worked to the longer-term disadvantage of both countries. At times, artificially low prices have stimulated excess demand while suppressing supply and thus causing shortages. At other times, artificially high prices have stifled economic activity throughout the economy, especially in energy-intensive industries. Overall, the uncertainty about future government energy trade policies and actions has inhibited investment in energy production and energy consuming industries in both countries.

The Agreement builds on the lessons learned from the past by renouncing excessive government interference in our future energy trade and provides a framework for rational economic development of that trade. Because it will encourage the most efficient system for production, distribution and use of energy between the two countries, it will enhance the energy security of both countries. It should also result in lower overall energy costs over the longer term, which will contribute significantly to the international competitiveness of basic industries in each country.

The energy goods covered by the Agreement include petroleum,

natural gas, coal, electricity, uranium and other nuclear fuels.

The Agreement reaffirms the rights and obligations of both the United States and Canada with respect to the GATT prohibitions on import and export restrictions. Moreover, it makes explicit that both countries interpret the GATT to prohibit minimum export price requirements. In addition, the Agreement extends the GATT discipline to cover a prohibition on export taxes.

In an annex, the Agreement lists three specific changes to conform existing laws to these commitments: (1) The U.S. will exempt Canada from any potential restrictions on enrichment of foreign uranium which might be imposed under Section 161v of the Atomic Energy Act; (2) Canada will exempt the U.S. from its export restrictions on unprocessed uranium; and (3) the U.S. will allow Canada access to a maximum of 50 thousand barrels per day of Alaskan oil currently restricted from export under Section 7(d) of the Export Administration Act, subject to the condition that this oil will be transported to Canada from a suitable location in the Lower 48 States.

The Agreement affirms that, as provided by the GATT, either country may restrict exports where necessary to respond to supply shortages, to maintain a domestic price stabilization program or to prevent exhaustion of a finite energy resource. However, it may impose a restriction only if the restriction (1) does not reduce the proportion of total supply historically available to the other country; (2) does not disrupt the normal channels of supply or mix of energy products; and (3) does not impose a higher price on exports than for comparable domestic sales. What this means is that neither country will treat the buyers or sellers of energy of the other country as "second-class" customers or suppliers. Canada gains assured market access for its energy exports to the U.S., and the U.S. gains assured access to Canadian supplies for its imported energy requirements.

The Agreement provides for consultation in the event either country believes the energy regulatory actions of the other country would directly discriminate against its energy goods or businesses.

An annex to the Agreement lists regulatory changes to be made to conform to the Agreement. Canada will eliminate its electricity export price test that requires the export price to be not significantly less than the least-cost alternative available to the importer. Other Canadian export tests (price tests and "surplus" tests) must be administered in a manner consistent with the principles of the Agreement.

The U.S. will eliminate any discriminatory treatment of British Columbia Hydro vis-a-vis comparably situated U.S. utilities in terms of access to the Bonneville Power Administration Intertie

into the California electricity market. In addition, it is expected that long-term arrangements will be negotiated to assure the development of electricity trade in a mutually beneficial manner consistent with the objectives and principles of the Agreement.

The Agreement recognizes the importance of government incentives for oil and gas resource development to the energy supply security of both countries and, therefore, allows such incentives to be maintained or created. This provision does not prevent the imposition of antidumping or countervailing duties.

The Agreement provides for only quite narrow exceptions to the prohibition on trade restrictions in situations involving national security; these are limited to situations of militarily related national security. The Agreement declares that there is no inconsistency between this Agreement and the obligations of either country under the International Energy Program of the International Energy Agency.

Chapter Ten: Trade in Automotive Goods

Automotive trade accounted for over one-third, or $46 billion, of the total bilateral trade between the U.S. and Canada in 1986. Under the U.S.-Canada Automotive Products Trade Agreement (Auto Pact) of 1965, 95 percent of bilateral automotive trade already moves duty-free. As a result of the FTA, all automotive trade will be duty-free, as long as it meets the rule of origin.

The U.S. and Canada have agreed to the removal of tariff and nontariff barriers and new origin rules designed to assure that the benefits of the FTA accrue to North American auto and auto parts producers. By removing trade and investment distorting practices, the FTA will encourage greater efficiency in motor vehicle production and will provide greater assurance that economic factors determine trade and investment choices between the U.S. and Canada.

Tariffs and Rule of Origin

All tariffs on U.S. and Canadian motor vehicles and parts will be eliminated by January 1, 1998. Most will be phased out over 10 years, but tariffs on aftermarket parts will be eliminated in five years.

The FTA rule of origin which is described in the chapter on rules of origin will apply to all U.S. imports of Canadian automotive products, but only to Canadian imports of U.S. automotive products not entering Canada under the Auto Pact. The FTA rule is based on change in Harmonized System tariff classification and includes a 50 percent U.S.-Canadian direct cost of manufacturing

test for vehicles and specified assembled parts.

Here is how the new FTA rules and the existing Auto Pact will work for imports of autos and parts into the U.S. from Canada:

The FTA rule of origin will replace the rule currently used by the U.S. to implement the Auto Pact. Upon implementation of the FTA, those motor vehicles and original equipment parts currently eligible for duty-free entry under the Auto Pact will be able to enter the U.S. duty-free only if they meet the new FTA rule of origin. Other auto parts that meet the FTA rule of origin will pay the FTA tariff until it is fully eliminated. Motor vehicles and parts that do not meet the FTA rule of origin will pay the full current most-favored-nation (MFN) duty, not the FTA duty.

The new rule of origin is tougher in that it requires that substantial manufacturing costs (materials and direct processing costs) be incurred in the U.S. and/or Canada, while the current test only assures that substantial costs (which can include advertising and overhead) or profits are incurred in the U.S. and/or Canada. This change will help both U.S. and Canadian auto parts manufacturers.

Here is how the new FTA rules and the existing Auto Pact will work for imports of autos and parts into Canada from the U.S.:

Canada's criteria for duty-free access into Canada under the Auto Pact will not change. Qualified producers (those that meet Canada's performance requirements) will continue to be able to import motor vehicles and parts into Canada duty-free from anywhere in the world. However, it has been agreed in the FTA that no new firms may qualify for Auto Pact or Pact-like benefits in Canada, except for the General Motors-Suzuki (CAMI) joint venture, if it qualifies by the 1989 model year.

For companies not meeting Canada's Auto Pact performance requirements, the FTA tariff will apply (until it is fully eliminated) to products imported from the U.S. that meet the FTA rule of origin. Motor vehicles and parts that do not meet the FTA rule of origin will pay the full current most-favored-nation (MFN) duty, not the FTA duty.

Duty Remission

Canada's export-based duty remission program will be eliminated January 1, 1989 on exports to the U.S. and terminated in all cases by January 1, 1998. The export-based duty remission program allows firms in Canada to reduce duties on motor vehicle and part imports in proportion to the Canadian value-added in

their exports of automotive parts.

Canada's production-based duty remissions will end by January 1, 1996 or earlier as contracts expire. Production-based duty remissions allow firms that are not members of the Auto Pact in Canada to avoid duties on automotive imports into Canada as long as they meet Canadian local content requirements.

There will be no new recipients of any Canadian automotive duty remission benefits, and current benefits will not be enhanced. U.S. and Canadian auto parts manufacturers will benefit from the elimination of these measures, which distort trade and investment.

Other Provisions

Canada will phase out its embargo on the importation of used vehicles over five years.

A Select Panel will be established to assess the state of the North American industry and to propose public policy measures and private initiatives to improve its competitiveness in domestic and foreign markets.

Chapter Eleven: Emergency Action

One of the basic tenets of the GATT trading system is that countries should be allowed to take temporary emergency actions restricting imports in order to remedy serious injury caused by increased imports. The drafters of the GATT recognized that a country would be more willing to enter into contractual obligations to reduce its trade barriers if it were able to reimpose the duties when and if imports of a particular product increased to such an extent as to cause injury to one of its industries producing a competing product. Both the U.S. and Canada have established "safeguard" procedures to provide emergency relief to domestic industries injured by imports.

The Agreement provides a two-track system aimed at preserving the existing rights of workers and firms in both countries to gain relief from import-related injury, while at the same time assuring the U.S. and Canadian business communities that the trade expansion created by the FTA will not be suddenly and arbitrarily cut back. Although the U.S. and Canada have not used such actions against each other very often, the possibility of taking actions reduces certainty of market access.

In the United States, domestic producers and workers will have access to relief under special revised provisions of Section 201 of the Trade Act of 1974.

Under the bilateral track, if imports resulting from FTA

duty reductions cause serious injury, the importing country may reinstate the pre-Agreement tariff or current MFN duty (whichever is lower), or suspend duty reductions. This can be done only once per product during the ten-year transition period for no longer than three years. After the transition period, such actions can only be taken by mutual agreement.

Under the global track, the FTA partners retain their GATT rights except that the importing country must exclude the other from an action involving other countries unless that country's imports are substantial and are found to be contributing importantly to the injury from imports. For purposes of this track, imports in the range of five percent to ten percent or less of total imports would normally not be considered substantial. "Contributing importantly" means an important cause, but not necessarily the most important cause.

If the exporting country is initially excluded from an import relief action, the importing country has the right to subsequently bring that country's trade under the import restraint action in the event of a surge in imports from that country. In no event may the exporting country's exports be cut back below the level they reached during a reasonable recent base period.

The FTA partner taking either a bilateral or global action must provide compensation aimed at expanding trade in another product or the exporting FTA partner may take a substantially equivalent retaliatory action.

Disputes arising after an action is taken are subject to binding arbitration under the dispute settlement provisions of the FTA.

Chapter Twelve: Exceptions for Trade in Goods

The Agreement incorporates the provisions of the GATT allowing for exceptions from GATT rules for limited reasons, such as to protect public health or morals or national treasures.

It also specifies certain miscellaneous exceptions from the FTA, including both countries' export controls on logs and existing East Coast Canadian export restrictions on unprocessed fish. Both countries' practices on the internal sale and distribution of beer are also exempted, but amendments to existing practices cannot deviate more from the obligations of the Agreement, and new measures must conform with the FTA.

GATT rights with respect to measures exempted from the FTA are expressly preserved.

PART THREE: GOVERNMENT PROCUREMENT

The general provisions regarding goods trade in Part Two do not apply to purchases of goods by governments.

Chapter Thirteen: Government Procurement

The Agreement expands the size of the government procurement markets which will be open to free and fair competition between U.S. and Canadian suppliers. It also establishes a solid framework for further elimination of "buy national" restrictions that presently inhibit sales by U.S. exporters to Canada.

The procedures used in the Agreement for government purchases build upon the open and competitive principles and procedures of the GATT Government Procurement Code. It improves Procurement Code procedures by establishing a common rule of origin, requiring an effective bid challenge system for all potential suppliers and improving transparency of bid selection, particularly for procurements which are single tendered. The U.S. currently provides for effective bid challenge procedures but Canada does not.

The U.S. and Canadian governments apply various buy national preferences in favor of suppliers of domestic goods. These preferences inhibit -- and in some cases prevent -- competition from foreign products. Under the Agreement, suppliers of goods which are manufactured in the U.S. and Canada and which contain at least 50 percent U.S. or Canadian content will be treated on an equal basis to suppliers of domestic goods for covered procurements.

"Buy American" and "Buy Canadian" restrictions are eliminated on the procurement of goods by U.S. and Canadian entities covered by the GATT Government Procurement Code between the Code threshold (for 1987, $171,000) and an FTA threshold of $25,000, and are subject to the same exclusions and exceptions as those covered by the Code.

Viewed in conjunction with the Procurement Code, the FTA will allow U.S. exporters to compete on a nondiscriminatory basis for all Code-covered procurements over $25,000.

The value of procurement opportunities covered by this chapter is estimated at approximately $3 billion of U.S. procurement and $500 million of Canadian procurement. Previously a majority of Canadian purchases were below the Code threshold, versus a small minority for U.S. entities. Therefore, Canadian entities will open a much higher percentage of procurements under the FTA than will U.S. entities. As a result of the new opportunities offered by Canadian entities under this chapter, procurement opportunities in Canada for U.S. exporters are increased by more

than 100 percent.

Principles are established for bid challenge procedures. These include a requirement that a reviewing authority with no substantial interest in the outcome of the procurement be responsible for deciding bid challenges. Suppliers may protest government procedures on their own initiative and receive timely settlement of complaints.

Each government must provide transparency in its procurement process. Public notice must be provided of all the criteria it intends to use in evaluating a bid (including offsets) and the award must be based on those criteria.

Within one year after the conclusion of the current multilateral negotiations on the GATT Procurement Code, there will be an opportunity to improve and expand coverage of this chapter by further negotiations with Canada.

PART FOUR: SERVICES, INVESTMENT AND TEMPORARY ENTRY

GATT rules cover trade in goods only. Services and investment are not covered. The FTA goes beyond traditional GATT areas to establish rules in these areas that break new ground and set an important precedent for the Uruguay Round of multilateral trade negotiations, in which GATT countries are considering whether to extend GATT disciplines to these new areas.

Chapter Fourteen: Services

The Agreement breaks new ground by providing rules governing trade and investment in services industries. Both the U.S. and Canada have relatively open markets for services. The Agreement will ensure continued openness by providing that future laws and regulations will not discriminate against services providers of the other country.

A wide range of services industry sectors are covered by the agreement, including: construction, tourism, insurance, telecommunications-network-based enhanced services and computer services, some professional services, services relating to mining and agriculture, wholesale and retail trade, management services and other business services. Transportation services are not covered.

Future U.S. and Canadian government measures such as laws, regulations or licensing requirements affecting services trade and investment must not have the purpose or effect of discriminating between the services providers of either country. The right of establishment, the right to sell across the border, and greater

transparency in regulations are also provided. The Agreement does not affect subsidies for or government procurement of services.

There are annexes which clarify the application of the services agreement to architecture, tourism, and telecommunications-network-based enhanced services and computer services.

In architecture, both sides will review the work of professional organizations to develop mutually acceptable standards.

In telecommunications-network-based enhanced services and computer services, the Agreement ensures the future development of an open and competitive market including access to and use of the basic telecommunications network.

In tourism, the Agreement ensures continued open markets for tourists and tourism service providers.

The Agreement provides the opportunity for future negotiations to increase liberalization, sectoral coverage and other obligations.

Chapter Fifteen: Temporary Entry for Business Persons

The U.S. and Canada have agreed that as a part of the special trading relationship established by the Agreement, it is desirable to facilitate temporary entry for business persons into the territory of each country on a reciprocal basis. The Agreement and immigration laws of both countries will provide transparent criteria and procedures for temporary entry of certain persons who conduct trade in goods and services as well as investment activities, while maintaining necessary provisions to ensure border security and protect indigenous labor and permanent employment. These provisions facilitate entry for citizens of each country into the territory of the other on both a short- and long-term basis depending on the type of commercial activity involved.

The two countries agree to provide temporary entry for business persons through transparent laws and regulations and to provide explanatory materials in order to enable business persons to become acquainted with such laws and regulations. These provisions will be applied in a manner that provides the desired entry without undue delay or impairment in the conduct of trade and investment under the Agreement.

The countries will exchange data on temporary entry and consult at least once a year concerning the operation of the Agreement and consider provisions that may further enhance temporary entry, including amendments and additions to coverage of persons under the Agreement.

Should a dispute arise concerning the provisions of this chapter, it may be referred to the dispute resolution provisions of the Agreement if the matter involves a pattern of practice and available administrative remedies have been exhausted.

Coverage of persons involves Business Visitors and Professionals who shall be admitted without prior approval procedures, petitions, labor certification tests, or other procedures having similar effect, as well as Intra-Company Transferees and Traders and Investors who will no longer face labor certification tests or other similar procedures.

Business Visitors

A business person engaged in one of the covered occupations and entering for the described purpose shall be granted entry under Schedule 1 of the Agreement. This schedule defines the persons involved in a number of business areas and the activities undertaken. The approach provides transparency and specificity to a number of areas of business activity that have in the past been unclear or subject to conflicting interpretation.

One important provision allows persons of either country to provide after-sales service for the length of the contract or warranty period on commercial or industrial machinery and equipment or computer software that has been purchased outside its territory. This allows firms to better provide after-sales service functions that are often a necessary component in the sale of complex machinery, equipment and computer software.

Traders and Investors

A business person seeking temporary entry in order to carry on substantial trade in goods or services in a capacity that involves supervisory, executive or essential skills, or to direct the operations of an enterprise in which the person has invested, shall be granted temporary entry under new, liberalized procedures in the Agreement. The new provisions provide business persons the assurance that after they have received an initial certification, they may freely enter as often as their business needs require.

Professionals

The FTA partners will admit persons who are members of certain professions and engaged in their related business activities. Coverage includes the generally recognized professions such as engineers, architects, and certain scientific and technical specialties. The Agreement also covers newer professions such as management consultants. Revised procedures should provide improved processing of entry requests.

Intra-Company Transferees

Intra-company transferees, when engaged in managerial or executive activities or possessing specialized knowledge, will be admitted. Requirements that certain companies train replacement personnel have been removed.

Chapter Sixteen: Investment

For U.S. investment in Canada, the Agreement builds on the substantial liberalization measures already taken by the present Canadian government. It freezes those measures in place and bars most new measures which would adversely affect U.S. investment.

For its part, the U.S. will continue its open investment climate for Canadian investors in accord with the basic principles set out in the President's Investment Policy Statement of September 9, 1983.

The Basic Rules

The Agreement sets out four basic rules to govern the treatment of investors from each country:

National Treatment and Non-discrimination: Each party is to treat investors of the other party at least as favorably as its own investors (in like circumstances) with respect to the establishment of new businesses and the acquisition of existing business, and with respect to the conduct, operation and sale of business enterprises located in its territory. Neither party, thus, can require that investors sell investments by reason of their nationality, or that their own nationals must hold a minimum level of equity in investments made by investors of the other country.

Elimination of Performance Requirements: Neither party, when permitting an investment in its territory, or when regulating an investment, may impose or enforce trade-distorting measures which require an investor to export a certain amount of goods, or substitute locally produced goods for imports, or buy or give a preference to locally produced goods. (This rule also applies to third country investors when such measures could significantly affect U.S.-Canadian trade.)

Expropriation Only in Accordance with International Law Standards: Neither party may directly or indirectly expropriate the holding of an investor from the other country except in accordance with generally accepted international law standards which, inter alia, require payment of prompt, adequate and effective compensation at the fair market value of the expropriated properties.

Free Transfer: Neither party may prevent an investor from transferring profits, earnings from an investment, or sales and liquidation proceeds (with only limited exceptions relating, for example, to limitations on dividend payments set by bankruptcy laws.)

Exceptions

Certain measures are excluded, notably those involving transportation services. The provision of financial services (except certain insurance measures) are covered elsewhere in the Agreement.

In general, existing measures are grandfathered, such as the existing U.S. laws restricting foreign investment in such fields as atomic energy and communications and the Canadian laws restricting foreign investment in communications. Those measures may not be made more restrictive.

The oil and gas and uranium mining industries were subject to published policies under the Investment Canada Act prior to October 3, 1987; the application of these policies and of the thresholds of the Agreement to these industries is to be clarified by an exchange of letters.

Liberalization of Entry and Exit Restrictions

The Agreement does achieve major liberalization of Canada's Investment Canada Act, which is Canada's principal mechanism for regulating investment into Canada and, a fortiori, sales of Canadian businesses to foreign investors.

Canada's threshold for review of direct acquisitions by U.S. investors is raised to C$150 million (in constant 1992 Canadian dollars) after three years from the date of entry into force of the FTA.

Canada will no longer review indirect acquisitions after the end of that three-year period.

Canada also will apply these higher thresholds to an acquisition by a foreign investor when a U.S. investor seeks to sell its Canadian business.

Canada will offer to buy, at a fair open market price (determined by independent assessment) any business enterprise in Canada in the cultural industry which Canada requires be divested when reviewing an indirect acquisition. If, for example, a U.S. firm seeks to buy another U.S. firm with a Canadian subsidiary in a cultural industry, Canada may require the new owner to divest the cultural subsidiary to a Canadian purchaser. (The FTA exempts cultural industries generally from the Agreement, and

therefore from the Chapter.)

Canada will no longer impose certain trade-distorting performance requirements under the Investment Canada Act. These are requirements to export, substitute local production for imports, source or purchase locally, or achieve specified domestic content.

PART FIVE: FINANCIAL SERVICES

Chapter Seventeen: Financial Services

This is the first U.S. bilateral agreement covering the entire financial sector. It removes essentially all existing discrimination faced by U.S. financial institutions operating in Canada, allows the flexibility to acquire Canadian financial services firms, improves access between our markets, and allows financial firms on both sides of the border to compete on a more equal basis. Canadian financial institutions will continue to enjoy the current treatment and open access they now receive in the U.S. financial market.

The Agreement covers all current and future laws, regulations, and practices relating to financial institutions in both countries. Financial institutions include commercial banks, investment banks, trust and loan companies, savings-and-loan institutions, certain activities of insurance companies, and other institutions so designated under the laws of each country. (Financial services offered by nonfinancial institutions and insurance services are covered elsewhere in the Agreement.)

The domestic assets of foreign bank subsidiaries operating in Canada (the "closely held" or Schedule B banks) are currently limited to 16 percent of all domestic assets of the Canadian banking system. Foreign bank subsidiaries also face individual capital limits and other restraints such as the sale of loans to the parent bank. Under this agreement, U.S. commercial bank subsidiaries will be exempt from the current restrictions on market share, asset growth, and capital expansion, in the same way that Canadian banks are free from these restraints. U.S. commercial banks will also be allowed to establish or acquire securities firms or federally-regulated Canadian insurance and trust companies, again in the same manner as Canadian banks.

Under the current proposals for financial market reform in Canada, foreign insurance companies have perhaps been the most disadvantaged because of the so-called "10/25" rule. This prevents a nonresident from acquiring more than 10 percent ownership of a Canadian insurance company, or trust and loan company; total nonresident ownership is limited to 25 percent. Under the

Agreement, U.S. insurance firms will now receive the same rights as Canadian insurance companies to diversify in the financial sector by establishing or acquiring federally-regulated insurance companies, trust companies, Schedule B banks, or securities firms.

While Ontario, Quebec, and other provinces have liberalized their securities markets and opened them to foreign investors, the federal government implemented a policy of reciprocity which has held up the applications for entry by U.S. securities firms and banks. Under the Agreement, these applications will be reviewed on a prudential basis, just as for Canadian firms, rather than on a reciprocity basis. U.S. securities firms established in Canada will have the ability to diversify through a holding company structure into other financial activities such as banking and insurance.

Under the Agreement, the U.S. also made a number of specific commitments, although there were no national treatment barriers in the United States to eliminate. The U.S. agreed to guarantee the right of Canadian banks to retain their multi-state branches that were grandfathered under the International Banking Act of 1978. If the Glass-Steagall Act, which separates commercial and investment banking in the U.S., is amended, the U.S. will extend these benefits to Canadian financial institutions in the U.S. Such guarantees have never before been extended to any other country.

The U.S. responded to Canadian concerns regarding the treatment of their banks and securities firms which merge in Canada, but have operations in the U.S., by agreeing to allow Canadian banks (as well as U.S. and other foreign banks) in the U.S. to underwrite and deal in debt obligations fully backed by Canada or its political subdivisions. This is a new power that is consistent with the existing ability of banks to underwrite and deal in securities of the U.S. Government and its political subdivisions, yet does not undermine the basic tenets of the Glass-Steagall Act.

The new power enables Canadian firms to take advantage of liberalization in Canada, while retaining the most important securities activities in the U.S. One of the side effects of this new power will be a direct benefit to the Canadian federal government, the Agent Crown corporations, the provincial governments, and the municipal governments in Canada. Since, as a result of the agreement, their debt will be underwritten and traded by more firms in the U.S., it offers the potential for a wider, deeper market and, therefore, lower borrowing costs.

In addition to these specific commitments, both the U.S. and Canada have made general commitments. The U.S. has agreed to continue the current treatment provided to Canadian financial

institutions established in the U.S. as long as Canada continues to liberalize its financial markets and to extend the benefits to U.S. financial institutions established in Canada. Canada has made an analogous commitment. The Agreement establishes a formal consultative mechanism between the U.S. Department of the Treasury and the Canadian Department of Finance to oversee this liberalization and deal with any other financial services issues.

PART SIX: INSTITUTIONAL PROVISIONS

This part establishes procedures for general dispute settlement and the special arrangements for antidumping and countervailing duties.

Chapter Eighteen: Institutional Provisions

The Agreement provides for a consultative mechanism to avoid disputes and resolve any disagreements quickly and easily, with provisions for use of binational panels of independent experts for unresolved disputes.

The Canada-United States Trade Commission is established to supervise the implementation of the Agreement and to resolve disputes on all matters except financial services, antidumping and countervailing duties. The Commission will be composed of Cabinet-level representatives of both governments and will operate by consensus.

Either government may request consultations and will attempt to avoid or resolve disputes through consultations. If consultations are unsuccessful, either government may request a meeting of the Commission. The Commission may use a mediator or draw on expert advice in seeking a bilateral settlement. If not resolved in this manner, the Commission may agree to refer the matter to binding arbitration or a panel can be established at the request of either party.

A panel will be appointed from a roster maintained by the Commission. Two panelists will be appointed by each government and a fifth, the chairman, will be jointly agreed, selected by the other four, or chosen by lot. The panel, after hearing the arguments of both sides, will report its findings and recommendations to the Commission. If either side believes the panel has erred, it may present written objections to the panel, which may reconsider and revise its final report.

After receiving the panel's final report, the Commission will agree on the resolution of the dispute, whenever possible removing the nonconforming measure rather than paying compensation. If the Commission cannot agree and a government believes its

fundamental rights or benefits under the FTA are being impaired, that government may withdraw equivalent benefits from the other.

Chapter Nineteen: Binational Dispute Settlement in Antidumping and Countervailing Duty Cases:

The U.S.and Canada will continue to apply their own national antidumping (AD) and countervailing duty (CVD) laws to goods imported from the other country. In such cases, independent binational panels acting in place of national courts will expeditiously review final AD and CVD determinations to decide whether they are consistent with the AD or CVD law of the country that made the determination.

The panel procedure -- combining independent review and judicial standards with an FTA-created forum and a tight schedule -- will allow quick resolution of AD/CVD issues between the two countries without unnecessary bilateral trade friction, yet preserve the rights of injured companies to obtain relief from unfair trade practices. The panel mechanism will remain in place for up to seven years, while a bilateral working group attempts to develop new approaches to unfair pricing and government subsidies that would ensure effective discipline over unfair trade practices and minimize unfair trade disputes within the new free trade area.

Under the FTA's panel procedure, independent binational panels will review final AD and CVD determinations by the relevant administrative agencies of the U.S. and Canada. In one FTA country's AD or CVD case involving a product from the other FTA country, panels would substitute for national courts unless, in a particular case, no party preferred panel to court review. Panel decisions would be binding as a matter of international law with respect to the particular matter reviewed. This system of review would apply to final determinations made by an administrative agency after the date of entry into force of the Agreement. It will not affect either country's judicial review of AD/CVD cases concerning imports from third countries.

In the U.S., the Department of Commerce makes final dumping or subsidy determinations in AD/CVD investigations and reviews of AD/CVD orders, and the U.S. International Trade Commission makes final determinations in AD/CVD investigations as to whether a U.S. industry has been injured. These determinations in a U.S. case involving goods from Canada, and Canada's parallel determinations in a Canadian case involving goods from the U.S., will be subject to panel review. This symmetry in the panel review process will enhance the rights of U.S. producers and exporters, since judicial review of some Canadian dumping and subsidy findings is not now available.

The panels will review final AD/CVD determinations solely to determine, based on the administrative record, whether the relevant administrative agency applied its national AD/CVD law correctly. The panels will employ the same standard of review and the same general legal principles as would a domestic court. If a panel finds that the administrative agency applied the law correctly, it will affirm the determination. Otherwise, it will send the case back for a corrected determination.

Although formally only the two governments may invoke the panel review process, the governments will automatically trigger panel review at the request of any person who otherwise could have challenged the determination in court. Parties to the case or their lawyers will argue their positions before the panel, as they would before a court. Sensitive business information will be protected against unlawful disclosure in the panel review process.

Panelists will generally be selected from a roster to be developed by the two governments. Individuals on the roster will be U.S. or Canadian citizens chosen for objectivity, reliability, sound judgment, and general familiarity with international trade law. To ensure impartiality, roster members, with the exception of judges, may not be government officials. Individual panels will have five members, the U.S. and Canada each appointing two. The fifth panelist will be chosen by agreement between the two governments, among the four panelists, or by lot from the roster. Because panels will be performing a judicial-like function, a majority of the panelists including the chairman must be attorneys.

The two governments expect the panel system to work smoothly and effectively. As a safeguard against an impropriety or gross panel error that could threaten the integrity of the process, however, the FTA provides for an "extraordinary challenge procedure." In carefully defined circumstances, either government could appeal a panel's decision to a three-member committee of U.S. and Canadian judges or former judges. The committee would make a prompt decision to affirm, vacate, or remand the panel's decision.

The Agreement also establishes a procedure for advisory panel review of amendments to U.S. or Canadian AD or CVD laws enacted after the FTA enters into force. The two governments will consult about any proposed AD/CVD amendments applicable to the other country's goods. If one country changes its AD or CVD statutes, the other government may request that a panel be established to give an advisory opinion on whether the amendment is consistent with the GATT and the FTA.

If the panel views the amendment as inconsistent with the GATT or the Agreement and recommends modifications to eliminate the inconsistency, the two governments will consult to reach a solution, which could include seeking remedial legislation. If

no agreement is reached or remedial legislation agreed on is not enacted, the complaining government may enact a comparable amendment to its AD/CVD law or terminate the Agreement upon 60 days' written notice.

PART SEVEN: OTHER PROVISIONS

Chapter Twenty: Other Provisions

Provisions which did not fall logically into other chapters appear here. Included are some particular sectoral issues, as well as some general rules affecting the overall Agreement.

Softwood Lumber

The 1986 Memorandum of Understanding (MOU) on Softwood Lumber is grandfathered. The MOU resolved a countervailing duty case brought by the U.S. softwood lumber industry against Canada's lumber exports. Canada agreed to apply a 15 percent export tax on lumber until such time as the provincial stumpage pricing practices were altered.

Plywood

Canada will decide by March 15, 1988 whether to allow the use of U.S. standard C-D grade plywood in housing it finances. If so, U.S. tariff concessions on plywood and particleboard will begin to be implemented on January 1, 1989. If not, a panel of experts will examine the issue and the governments will consult on how to implement the tariff concessions.

Culture

It has been the policy of Canadian governments to promote cultural activities with the goal of fostering Canada's unique cultural heritage. Some of these measures have had trade effects and an adverse impact on U.S. commercial interests.

The U.S. recognizes the importance to Canada of maintaining its cultural identity. At the same time, however, the U.S. wants to ensure that Canadian cultural policies do not constitute a discriminatory and unnecessary barrier to U.S. trade.

Certain "cultural industries" are exempt from the provisions of the FTA. This allows either country to maintain programs that would otherwise be inconsistent with the Agreement. However, the other country retains the right to retaliate with measures of equivalent commercial effect whenever the cultural exemption hurts that country's commercial interests. The right to take countermeasures is not subject to prior invocation of the Agreement's

dispute settlement provisions.

Cultural activities exempted from the FTA include the publication, sale, distribution or exhibition of: books, magazines, and newspapers; film and video recordings; audio or video music recordings; and also radio, television and cable dissemination. Of course, tariffs will be eliminated on all these products.

In addition, Canada has agreed to alter a number of practices that discriminate against U.S. businesses. These new steps include elimination of a print-in-Canada requirement for tax benefits and increased copyright protection for the retransmission of commercial broadcasts.

Other Provisions

The two governments agreed that if either takes trade actions to counteract a serious deterioration in its balance-of-payments position, it will do so consistent with its rights and obligations under the GATT, the International Monetary Fund and the Organisation for Economic Cooperation and Development.

The precedence of the 1980 tax convention is stated because the Agreement takes precedence over other agreements unless specified.

The standard GATT national security disclaimer is adopted, except for energy and government procurement. For energy, there is a more limited national security provision specified in the energy chapter. For government procurement, the GATT Government Procurement Code provision is adopted.

The establishment of government monopolies is expressly permitted, but it must be done in a way that does not violate the principles of the Agreement.

The Agreement states that if measures not expressly prohibited are deemed nevertheless to nullify or impair benefits reasonably expected under the Agreement, dispute settlement can be invoked.

PART EIGHT: FINAL PROVISIONS

Chapter Twenty-One: Final Provisions

The two governments agree to exchange necessary statistical information and to publish information to facilitate implementation of the Agreement. The Agreement will become effective January 1, 1989. It can be amended by mutual agreement and can be terminated by either party with six months' notice.

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For Further Information, Contact: Area Code 202

The Office of the U.S. Trade Representative
- Office of Canada.....395-5663
- Office of Public Affairs.....395-3230

Department of Commerce
- Office of Canada.....377-3101
- Office of Public Affairs.....377-3808

Department of Agriculture
- Office of International Trade Policy.....382-1338
- Office of the Press Secretary.....447-4623

Department of the Treasury
- Office of International Trade.....566-8107
- Office of International Investment.....566-5811
- Canada Desk (Financial Services).....566-2747

Department of State
- Bureau of Economic and Business Affairs
  - Office of Trade.....647-1718
  - Office of Public Affairs.....647-1942
- Bureau of European and Canadian Affairs
  - Office of Canadian Affairs.....647-1097

Department of Labor
- Office of International Economic Affairs.....523-6096
- Office of Public Affairs.....523-9711

Department of Energy
- Office of Int'l Affairs and Energy Emergencies....586-5800

ACTE/CAN MEMBERS
as of April 29, 1988

ABC Custom Cedar Homes, Inc.	Sonoma, CA
ADC Telecommunications	Bloomington, MN
AT&T	New York, NY
A-C Brake Co., Inc.	Louisville, KY
A.T. Cross Company	Lincoln, RI
ADAPSO	Arlington, VA
ALCOA	Pittsburgh, PA
AMCA International Corporation	Hanover, NH
Aaonton Group, Inc.	Plano, TX
Action Associates	Bloomington, MN
Aetna Life and Casualty Company	Hartford, CT
Aerospace Industries Association of America, Inc.	Washington, DC
Afro/Hispanic-American Chambers of Commerce	Bossier City, LA
Air Conditioning and Refrigeration Institute	Arlington, VA
Air Conditioning Contractors of America	Washington, DC
Alaska Quality Control & Technical Services, Ltd.	Anchorage, AK
Albert Seisler Machine Corporation	Mohnton, PA
Alderfer & Herm	Denver, CO
Allied-Signal International, Inc.	Morristown, NJ
Allis - Chalmers Corporation	West Allis, WI
Almerica Overseas, Inc.	Destin, FL
Alpha Research, Inc.	Glendale, WI
Alumax, Inc.	San Mateo, CA
Amana Refrigeration, Inc.	Amana, IA
Amatos, Inc.	Middletown, CT
Ambler Organizational Consultants, Inc.	Cherry Hill, NJ
Amerace Corporation	Hackettstown, NJ
Amerex Corporation	Trussville, AL
American Association of Exporters & Importers	New York, NY
American Association of Meat Processors	Elizabethtown, PA
American Business Conference	Washington, DC
American Cast Metals Association	Des Plaines, IL
American Council of Independent Laboratories	Washington, DC
American Electronics Association	Washington, DC
American Express Company	New York, NY
American Federation of Small Business	Chicago, IL
American Frozen Food Institute	McLean, VA
American Furniture Manufacturers Association	Washington, DC
American Gas Association	Arlington, VA
American Hotel and Motel Association	Washington, DC
American Institute of Marine Underwriters	New York, NY
American Institute of Small Business	Minneapolis, MN
American Meat Institute	Rosslyn, VA
American Newspaper Publishers Association	Washington, DC
American Paper Institute	New York, NY
American Retail Federation	Washington, DC
American Street Corridor Business Association	Philadelphia, PA
American Trucking Association	Alexandria, VA

Americas Society	New York, NY
Amigo Sales, Inc.	Bridgeport, MI
Amoco Corporation	Chicago, IL
Andersons	Maumee, OH
Archer Daniels Midland	Decatur, IL
Armtek Corporation	New Haven, CT
Arthur Andersen & Company	Chicago, IL
Arthur Young	New York NY
Artmor Plastics Corporation	Cumberland, MD
Associated Builders & Contractors	Washington, DC
Associated Lumber Industries, Inc.	Carbondale, IL
Association of Collegiate Entrepreneurs	Wichita, KS
Association of Home Appliance Manufacturers	Alexandria, VA
Atlantic Council Canada Group	Washington, DC
Augat, Inc.	Mansfield, MA
Austad's	Sioux Falls, SD
Avon Products, Inc.	New York, NY
B.F. Goodrich Company	Akron, OH
BP America, Inc.	Cleveland, OH
Babcock & Wilcox Company	New Orleans, LA
Baker Service Tools	Houston, TX
Baldor Electric Company	Fort Smith, AR
Ball Corporation	Muncie, IN
Ball Publishing Company	Arcanum, OH
Bank of America	San Francisco, CA
Barnes Group, Inc.	Bristol, CT
Barrett Trailers, Inc.	Oklahoma City, OK
Barrios Technology, Inc.	Houston, TX
Barrister Information Systems Corporation	Buffalo, NY
Bearings, Inc.	Cleveland, OH
Beckman Instruments, Inc.	Fullerton, CA
Bemis Manufacturing Company	Sheboygan Falls, WI
Bend Photo Center, Inc.	Bend, OR
Bernard R. Horn Company	Folcroft, PA
Better Business Bureau of Maricopa County	Mesa, AZ
Black & Decker Corporation	Towson, MD
Blair Cartage, Inc.	Newbury, OH
Blatt's Bakery	Put-in-Bay, OH
Boeing Company	Seattle, WA
Boise Cascade Corporation	Boise, ID
Bowes Manufacturing, Inc.	Solon, OH
Bristol-Myers Company	New York, NY
Brodart Company	Williamsport, PA
Brooklyn Union Gas Company	Brooklyn, NY
Brown Capital Management, Inc.	Baltimore, MD
Brown Deer Bank	Brown Deer, WI
Brown-Forman Corporation	Louisville, KY
Buffalo Forge Company	Buffalo, NY
Buffalo News	Buffalo, NY
Business Roundtable	Washington,DC
CAN-AM Business Council of the Greater Buffalo Chamber of Commerce	Buffalo, NY
CF Industries	Long Grove, IL
CPC International, Inc.	Englewood Cliffs, NJ

Calvert Gallery	Washington, DC
Carbis Walker & Associates	Butler, PA
Cargill, Incorporated	Minneapolis, MN
Carlton Group	Richmond, VA
Carolina Freight Carriers Corporation	Cherryville, NC
Cass County Abstract Company	Fargo, ND
Castite Systems, Inc.	Cleveland, OH
Caterpillar, Inc.	Peoria, IL
Champion International Corporation	Stamford, CT
Charles Beck Machine Corporation	King of Prussia, PA
Charles F. McAfee Architects Engineer Planners	Wichita, KS
Charter Medical Corporation	Macon, GA
Chattahoochee Business Group	Marietta, GA
Chicago Barter Corporation	Lombard, IL
Chicone Groves	Orlando, FL
Christy's	Ellwood City, PA
Chrysler Corporation	Highland Park, MI
Citicorp	New York, NY
Citizens for a Sound Economy	Washington, DC
Citizens for the U.S.-Canada Free Trade Pact	Washington, DC
Clark Seals, Ltd.	Tulsa, OK
Claseman Management Services	St. Paul, MN
Climatic Control Company, Inc.	Milwaukee, WI
Coalition of Service Industries, Inc.	Washington, DC
Coca Cola Company	Atlanta, GA
Colborn's	Billings, MT
Coleco Industries, Inc.	West Hartford, CT
Collectors Guild Ltd.	Wilmington, NC
Columbia Chocolates By Mordens	Astoria, OR
Comdisco, Inc.	Rosemont, IL
Commercial Design Consultants	Milwaukee, WI
Committee for Small Business Exports	Aspen, CO
Comp-U-Card International, Inc.	Stamford, CT
Competition Cams, Inc.	Memphis, TN
Competitive Enterprise Institute	Washington, DC
Computer & Business Equipment Manufacturers Association	Washington, DC
Computer & Communications Industry Association	Washington, DC
Conco Systems, Inc.	Verona, PA
Concord Engineering, Inc.	Richmond, CA
Concord, Inc.	Fargo, ND
Consolidated Freightways, Inc.	Menlo Park, CA
Contact Systems Corporation	New York, NY
Control Data Corporation	Minneapolis, MN
Cooper Industries, Inc.	Houston, TX
Coopers & Lybrand	New York, NY
Copyright Clearance Center	Salem, MA
Creative Management Concepts	Reading, PA
Curtis Circulation Company	Hackensack, NJ
Custom Engineering, Inc.	Englewood, CO
D&M Consulting & Brokerage, Inc.	Marshfield, WI
D-M-E Company	Madison Heights, MI
Dawg Duvers & Company	Jesup, GA
Deering Lumber, Inc.	Biddeford, ME

Design & Manufacturing Corporation	Connersville, IN
Di-Rec Services	Dallas, TX
Distilled Spirits Council of the U.S., Inc	Washington, DC
Dollar Power Discount Store	San Francisco, CA
Dolphin Photo Center, Inc.	Bend, OR
Donaldson Company, Inc.	Minneapolis, MN
Dow Chemical, U.S.A.	Midland, MI
Dow Corning Corporation	Midland, MI
Dunkin' Donuts Incorporated	Randolph, MA
E. I. du Pont de Nemours & Company	Wilmington, DE
E. J. Kearney & Company	Portland, ME
E. R. Clarke Associates, Inc.	Lake Forest, IL
Eastern Building Material Dealers Assoc.	Media, PA
Eastman Kodak Company	Rochester, NY
ERA Steel Construction Corp.	White Plains, NY
Echlin Corp.	Branford, CT
Eclipse, Inc.	Rockford, IL
Econocorp, Inc.	Randolph, MA
Elbert Bradshaw Enterprises	Carmel, IN
Electro Rent Corporation	Santa Monica, CA
Ellett Brothers	Chapin, SC
Emergency Committee for American Trade	Washington, DC
Enerco Technical Products, Inc.	Cleveland, OH
Equitable Financial Companies	New York, NY
Ernst & Whinney	New York, NY
Esselte Business Systems, Inc.	Garden City, NY
Event Specialists, Inc.	Anchorage, AK
Executive Report	Pittsburgh, PA
Exxon Corporation	New York, NY
FMC Corporation	Chicago, IL
Fairchild Industries	Chantilly, VA
Fila Associates	Miami, FL
Firestone Tire & Rubber Company	Akron, OH
First Bank System	Minneapolis, MN
First Boston Corporation	New York, NY
Flambeau Corporation	Baraboo, WI
Fleetwood Enterprises, Inc.	Riverside,CA
Flint Industrial Services	Albany, GA
Focus Electronics, Inc.	Brooklyn, NY
Ford Motor Company	Dearborn, MI
Fort Howard Paper Company	Green Bay, WI
Fraser Paper, Limited	Madawaska, ME
Fred Jones Manufacturing Company	Oklahoma City, OK
Free Press Media Group	Hendersonville, TN
Fuqua Industries, Inc.	Atlanta, GA
Fur Vault, Inc.	New York, NY
G.D. Searle & Company	Chicago, IL
Garrett Corporation	Torrance, CA
Gatherings South, Inc.	Greenville, SC
Gene Boyer & Associates, Inc.	Beaver Dam, WI
Genentech, Inc.	S. San Francisco, CA
General Dynamics Corporation	St. Louis, MO
General Electric Company	Fairfield, CT
General Motors Corporation	Detroit, MI

General Public Utilities Corporation	Parsippany, NJ
Georgia-Pacific Corporation	Atlanta, GA
Gerber Industries, Inc.	St. Peters, MO
Glowacki Everhardt & Association, Inc.	Toledo, OH
Goldman Sachs	New York, NY
Goodyear Tire & Rubber Company	Akron, OH
Gorman-Rupp Company	Mansfield, OH
Grand Trunk Western	Detroit, MI
Greater Newark Chamber of Commerce	Newark, NJ
Gregory Manufacturing Co., Inc.	Jackson, MS
Griffin Agency	Prospect, PA
Grit Publishing Company	Williamsport, PA
Grumman Corporation	Bethpage, NY
HMA International Business Development, Ltd.	Greensboro, NC
Half Price Books, Inc.	Dallas, TX
Hamilton Beach, Inc.	Waterbury, CT
Harodite Finishing Co., Inc.	North Dighton, MA
Hartz Mountain Corporation	Harrison, NJ
Heat - Timer Corporation	Fairfield, NJ
Helene Curtis Industries	Chicago, IL
Hercules, Inc.	Wilmington, DE
Hercules Engines, Inc.	Canton, OH
Herrmidifier Company, Inc.	Lancaster, PA
Hevi-Haul International Limited	Butler, WI
Hexagon Architecture Group Limited	Wyncote, PA
High-Tech International	Beltsville, MD
Hill & Associates	Madison, WI
Hoffman Air & Filtration Systems	East Syracuse, NY
Holiday Corporation	Memphis, TN
Holloman Child Development Centers	Hampton, VA
Honda North America	Torrance, CA
Honeywell, Inc.	Minneapolis, MN
Hoover Company	North Canton, OH
Horizon Resources Corporation	York, PA
Hotwatt, Inc.	Danvers, MA
Hunt Tractor, Inc.	Louisville, KY
ITT Corporation	New York, NY
ITBR, Inc.	Austin, TX
Illinois Lumber & Material Dealers Assoc.	Springfield, IL
Illinois Small Businessmen's Assoc.	Chicago, IL
Image Express	Southfield, MI
Imperial Schrade Corporation	New York, NY
Impressive Advance & Litho, Inc.	Waynesboro, VA
Incom International, Inc.	Pittsburgh, PA
Independent Bakers Association	Washington, DC
Industrial Commission of Arizona	Mesa, AZ
Industrial Heating Equipment Association	Arlington, VA
Informerific/Hexter & Associates	Cleveland, OH
Ingersoll-Rand Company	Woodcliff Lake, NJ
Intel Corporation	Santa Clara, CA
International Business Aviation Council, Ltd.	Washington, DC
International Business Machines Corp.	Armonk, NY
International Data Corporation	McLean, VA
International Franchise Association	Washington, DC

Interstate Electronics Corporation	Anaheim, CA
Interstate Natural Gas Assoc. of America	Washington, DC
JGP Marketing Group International, Inc.	Livonia, MI
JLG Industries, Inc.	McConnellsburg, PA
Jack O'Connor's Quality Beef 'N Seafood	Bridgewater, NJ
Johnson & Higgins	New York, NY
Johnson & Johnson	New Brunswick, NJ
Jon Holtshopple & Associates	Madison, WI
Judith E. Meador	St. Louis, MO
Justin Boot Company	Fort Worth, TX
Katy Industries, Inc.	Elgin, IL
Kentucky Manufacturing Company	Louisville, KY
Kerr-Hays Company	Ligonier, PA
Kimball Physics, Inc.	Wilton, NH
Kingsbury Machine Tool Corporation	Keene, NH
Knape & Vogt Manufacturing Company	Grand Rapids, MI
Knoll International Holdings, Inc.	New York, NY
Koch Industries	Wichita, KS
Koester Corporation	Defiance, OH
Kraft, Inc.	Glenview, IL
Krughoff Company	Naperville, IL
L.R. Nelson Corporation	Peoria, IL
LC Technologies, Inc.	Fairfax, VA
Lafarge Corporation	Washington, DC
Lamanite Enterprises Corporation	Clearfield, UT
Lancaster Laboratories, Inc.	Lancaster, PA
Laramy Products Company	Lyndonville, VT
Lavelle Aircraft Company	Philadelphia, PA
Lear Jet Corporation	Wichita, KS
Lee, Theisen & Stegall	Phoenix, AZ
Lennox Industries, Inc.	Dallas, TX
Lewis Ranches	Portland, OR
Lin-Art, Ltd.	Arlington Heights, IL
Litton Industries	Woodland Hills, CA
Longyear Company	Minneapolis, MN
Louisiana Association of Business and Industry	Baton Rouge, LA
Louisiana Retailers Association	Baton Rouge, LA
Louisville Plate Glass Company	Louisville, KY
Lowe's Companies, Inc.	North Wilkesboro, NC
Lumbermen Associates, Inc.	Philadelphia, PA
M. Brown & Sons, Inc.	Bremen, IN
M. S. Hansson, Inc.	Boulder, CO
MDB, Inc.	Pittsburgh, PA
Mack Trucks Inc.	Allentown, PA
Macmillan, Inc.	New York, NY
Maidenform, Inc.	New York, NY
Maine Machine Products Company	South Paris, ME
Maine Wild Blueberry Company	Machias, ME
Manufactured Buildings Components, Corp.	East Lansing, MI
Manufacturers Hanover Trust Co.	New York, NY
Marco Wood Products	Walled Lake, MI
Margaret Coleman Associates	Hinsdale, IL
Marketing Communications Systems	Portland, OR
Markets Abroad, Inc.	Miami, FL

Marriott Corporation	Washington, DC
Marsh & McLennan, Inc.	New York, NY
Marshall & Associates	Topsfield, MA
Mary Kay Cosmetics	Dallas, TX
Mattel, Inc.	Hawthorne, CA
Mayflower Transit, Inc.	Indianapolis, IN
Maytag Corporation	Newton, IA
McIntosh, Inc.	Norfolk, NE
McLaurin Parking Company	Raleigh, NC
McMinnville City Sanitary Service, Inc.	McMinnville, OR
Measurex Corporation	Cupertino, CA
Mel Boldt & Association	Mt. Prospect, IL
Mentholatum Company	Buffalo, NY
Merck & Co., Inc.	Rahway, NJ
Metal Treating Institute	Jacksonville Beach, FL
Metropolitan Life Insurance Company	New York, NY
Mid-Continent Cold Storage Company	Omaha, NE
Milbar Corporation	Chagrin Falls, OH
Miller Picking Corporation	Johnsontown, PA
Minnesota Mining & Manufacturing Company (3M)	St. Paul, MN
Mobil Oil Corporation	New York, NY
MonArk Boat Company	Monticello, AR
Monsanto Company	St. Louis, MO
Morgan Guarantee	New York, NY
Morton Buildings, Inc.	Morton, IL
Mosbacher Energy Company	Houston, TX
Moser Bag & Paper Company	Cleveland, OH
Mosler International	Hamilton, OH
Motor Vehicle Manufacturers Association	Detroit, MI
Murphy Oil Corporation	El Dorado, AR
N. J. Chapter - National Association of Women Business Owners	Cherry Hill, NJ
NVRyan	McLean, VA
Nalco Chemical Company	Naperville, IL
National American Wholesale Grocers Association	Falls Church, VA
National Association of Beverage Importers, Inc.	Washington, DC
National Association of Home Builders	Washington, DC
National Association of Manufacturers	Washington, DC
National Association of Photographic Manufacturers	Harrison, NY
National Association of Printing Ink Manufacturers	Harrison, NY
National Association of Women Business Owners	Chicago, IL
National Federation of Independent Business	Washington, DC
National Foreign Trade Council	New York, NY
National Frame Builders Association	Kansas, City, MO
National Grange	Washington, DC
National Gypsum Company	Dallas, TX
National Hispanic Business Association	Chamblee, GA
National Lumber & Building Materials Dealers Association	Washington, DC
National Machine Tool Builders Association	McLean, VA

National Retail Merchants Association	Washington, DC
National Small Business United	Washington, DC
National Starch & Chemical Corporation	Bridgewater, NJ
National-American Wholesalers Grocers' Association	Washington, DC
Nestle Enterprises, Inc.	Solon, OH
New England Council, Inc.	Boston, MA
New England Electric System	Westborough, MA
New Jersey Small Business Unity Council	Little Silver, NJ
Newlyweds Foods, Inc.	Chicago, IL
Nicholson, Inc.	Helena, MT
Norstar Bank	Buffalo, NY
North Haven Gardens	Dallas, TX
Northeastern Retail Lumbermen's Association	Rochester, NY
Northland Corporation	Greenville, MI
Northwest River Supplies, Inc.	Moscow, ID
O'Brien Communications	Del Mar, CA
Oakes & McClelland Company	Greenville, PA
Oakwood Markets, Inc.	Kingsport, TN
Occidental Chemical Corporation	Dallas, TX
Ogilvy & Mather International	New York NY
Oneida Ltd.	Oneida, NY
PC Etcetera	New York, NY
PII Affiliates, Ltd.	Manchester, PA
PLM Companies, Inc.	San Francisco, CA
PMI/Taylor Advertising	Columbus, OH
PPG Industries, Inc.	Pittsburgh, PA
Pacer Systems, Inc.	Billerica, MA
Pacific Interstate Company	Los Angeles, CA
Pacific Northwest International Trade Association	Portland, OR
Panhandle Eastern Corporation	Houston, TX
Paragon Electric Company, Inc.	Two Rivers, WI
Parlette Tire Co., Inc.	Erie, PA
Peat Marwick Main & Company	New York, NY
Pennwalt Corporation	Philadelphia, PA
People to People Associates	Lexington, MA
Pepsi-Cola International	Somers, NY
Perham Egg, Inc.	Perham, MN
Perlis Truckstops	Cordele, GA
Pet Incorporated	St. Louis, MO
Pfizer, Inc.	New York, NY
Pharmaceutical Manufacturers Association	Washington, DC
Philips Industries, Inc.	Dayton, OH
Picken Parts, Inc.	Fresno, CA
Pillsbury Company	Minneapolis, MN
Plabell Rubber Products, Inc.	Toledo, OH
Plasma Energy Corporation	Raleigh, NC
Plasco, Inc.	Woburn, MA
Ply*Gem Industries, Inc.	New York, NY
Polaris Industries, Inc.	Minneapolis, MN
Polaroid Corporation	Cambridge, MA
Powermax, Inc.	Columbus, OH
Pratt & Lambert	Buffalo, NY

Pre-Paid Legal Services	Ada, OK
Precision Twist Drill Company	Crystal Lake, IL
Price Company	San Diego, CA
Principal Financial Group	Des Moines, IA
Prinova Co., Inc.	San Francisco, CA
Printing Industries of America	Arlington, VA
Procter & Gamble	Cincinnati, OH
Product Development Corporation	Little Rock, AR
Professional Service Corporation	Green Bay, WI
Professional Wealth Management, Inc.	Asheville, NC
Professional Women in Construction & Allied Industries	White Plains, NY
Progressive Management Enterprises, Ltd.	St. Louis, MO
Pulp & Paper Machinery Manufacturers' Association	Washington, DC
Queen Carpet Corporation	Dalton, GA
Queen City Industries, Inc.	Piqua, OH
Quick, Finan & Associates, Inc.	Washington, DC
Quill Corporation	Lincolnshire, IL
Quillen Group	Groton, CT
R. R. Accessories, Inc.	Boston, MA
R. R. Donnelley & Sons Company	Chicago, IL
RJR Nabisco	Atlanta, GA
Radio KDNO	Delano, CA
Ramada, Inc.	Phoenix, AZ
Raytheon Company	Lexington, MA
Recognition Equipment, Inc.	Dallas, TX
Recon/Optical, Inc.	Barrington, IL
Rexnord, Inc.	Brookfield, WI
Rheem Manufacturing Company	New York, NY
Ridenour & Associates	Chicago, IL
Riordan, Crivello, Carlson & Menthkowski	Milwaukee, WI
Roll-o-Matic, Inc.	Kansas City, MO
Rooney, Plotkin & Willey	Providence, RI
Rorer International Pharmaceuticals	Fort Washington, PA
Rotron Engineering Company, Inc.	Woburn, MA
Rubber Manufacturers Association	Washington, DC
Rudolph Beaver, Inc.	Waltham, MA
Rural Gravuce Services, Inc.	Madison, WI
Russ Berrie and Company, Inc.	Oakland, NJ
S. C. Johnson & Son, Inc.	Racine, WI
SNC Manufacturing Company	Oshkosh, WI
Sabre Yachts	South Casco, ME
Safeway Stores, Inc.	Oakland, CA
Samsonite Corporation	Denver, CO
Sandmeyer Steel Company	Philadelphia, PA
Sargent-Welch Scientific Company	Skokie, IL
Scientific-Atlanta, Inc.	Atlanta, GA
Scott Paper Company	Philadelphia, PA
Sears, Roebuck and Company	Chicago, IL
Shaw Mudge & Company	Stamford, CT
Shell Oil Company	Houston, TX
Sheridan & Fritz, P.C.	Harrisburg, PA
Siliconix, Inc.	Santa Clara, CA

Simplex Time Recorder Company	Gardner, MA
Singer Company	Stamford, CT
Singer, Lewak, Greenbaum & Goldstein	Los Angeles, CA
Smada, Inc.	Phoenix, AZ
Small Business Foundation of America	Boston, MA
Small Business Hawaii, Inc.	Honolulu, HI
Small Business United of Missouri	St. Louis, MO
Smaller Business Associates of New England	Boston, MA
Smaller Manufacturers Council	Pittsburgh, PA
Smith Barney, Harris, Upham & Co., Inc.	New York, NY
Smith Rollinson	Alexandria, VA
Snyder General Corporation	Dallas, TX
Southern Connecticut Gas Company	Bridgeport, CT
Spacesaver Corporation	Fort Atkinson, WI
Specialized Carriers & Rigging Association	Alexandria, VA
Square One, Inc.	Madison, WI
Squibb Corporation	Princeton, NJ
Sta-Rite Overseas Corporation	Milwaukee, WI
Stackpole Corporation	Boston, MA
Standard-Thomson Corporation	Waltham, MA
Stemco, Inc. Truck Products	Longview, TX
Steiner Shipyard, Inc.	Bayou La Batre, AL
Stiegler, Inc.	Fargo, ND
Stone & Webster Engineering Corporation	Boston, MA
Storage Technology Corporation	Louisville, CO
Stripling-Blake Building Lumber Co., Inc	Austin, TX
Sun Electric Corporation	Crystal Lake, IL
Superior Technical Ceramics Corporation	St. Albans, VT
Syntex Corporation	Palo Alto, CA
T&H Building Supply	Redwood City, CA
TAPJAC Home Centers	Carthage, MO
TRW, Inc.	Cleveland, OH
TVI Creative Specialists	Washington, DC
Tandem Computers Incorporated	Cupertino, CA
Tandy Brands, Inc.	Fort Worth, TX
Tandy Corporation	Fort Worth, TX
Tanner Systems, Inc.	Sauk Rapids, MN
Tatum Enterprises	Honolulu, HI
Technivest, Inc.	South Bend, IN
Ted Grob Sales, Inc.	Grafton, WI
Telemarketing Company	Chicago, IL
Tenneco Gas Pipeline Group	Houston, TX
Termiflex Corporation	Merrimack, NH
Terry Neese Personnel Services	Oklahoma City, OK
Texas Industries, Inc.	Dallas, TX
Textron, Inc.	Providence, RI
Thomas J. Seitz Co., Inc.	Racine, WI
Tingley Systems, Inc.	San Antonio, FL
Toledo Harbor Warehousing, Inc.	Toledo, OH
Touche-Ross	New York, NY
Tracor, Inc.	Austin, TX
Trail King Industries, Inc.	Mitchell, SD
TransTech, Inc.	East McKeesport, PA
Tri-M Corporation	Kennett Square, PA

Triangle Research Development Corp.	Research Triangle Park, NC
Trinity Industries, Inc.	Dallas, TX
Trouble Shooters, Inc.	Omaha, NE
Truck Trailer Manufacturers Association	Alexandria, VA
Trucking Services, Inc.	Dearborn Heights, MI
U.S. Axle, Inc.	Pottstown, PA
U.S. Bearings & Drives of CA, Inc.	Santa Clara, CA
U.S. Chamber of Commerce	Washington, DC
U.S. Council for International Business	Washington, DC
USG Corporation	Chicago, IL
Ultrasystems, Inc.	Irvine, CA
Unilever United States, Inc.	New York, NY
United Fresh Fruit & Vegetable Association	Alexandria, VA
United Illuminating Company	New Haven, CT
United Industries, Inc.	Wichita, KS
Upjohn Company	Kalamazoo, MI
Valspar Corporation	Minneapolis, MN
Vanport Manufacturing, Inc.	Boring, OR
Village Green	Midland, MI
Virco Manufacturing Corporation	Torrance, CA
Vocational Rehabilitation Associates, Inc.	Eugene, OR
W.H. Brady Company	Milwaukee, WI
W.R. Grace & Company	New York, NY
WIS, Inc.	Toledo, OH
Wainoco Oil Corporation	Houston, TX
Waldorf Corporation	St. Paul, MN
Wayer Corporation	Landover, MD
Western Publishing Company, Inc.	Racine, WI
Weyerhaeuser Company	Tacoma, WA
Whale Scientific, Inc.	Commerce City, CO
Whirlpool Corporation	Benton Harbor, MI
White Plains Iron, Inc.	New York, NY
Wholesale Florists & Florist Suppliers of America	Arlington, VA
Will-Burt Company	Orrville, OH
William A. Price & Associates	Wheaton, IL
William H. Taylor & Company, Inc.	Allentown, PA
Wingspread Corporation	New York, NY
Women Entrepreneurs	Lincolnwood, IL
Women Featherbone Company	Gainesville, GA
Woodhead Industries, Inc.	Northbrook, IL
World Trade Counselors	Estes Park, CO
Zimpro Passavant, Inc.	Rothschild, WI
ZinYeast, Inc.	Marshfield, WI

Senator MELCHER [presiding]. Pete, how long is your testimony?
Mr. MYERS. Two pages. I can submit it for the record if you like.
Senator MELCHER. Please proceed, and we will go on from there.

STATEMENT OF PETER C. MYERS, DEPUTY SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, ACCOMPANIED BY ANN M. VENEMAN, ASSOCIATE ADMINISTRATOR, FOREIGN AGRICULTURAL SERVICE; AND DAN BRINZA, GENERAL COUNSEL'S OFFICE

Mr. MYERS. We do appreciate the opportunity to appear before this committee, and as Ambassador Holmer indicated, Ann Veneman and I will present the agricultural side.

As we look at it, U.S. agriculture from our viewpoint, Canada is both a major market and a major supplier. Our total United States agricultural imports from Canada in 1986 reached nearly $2 billion, and Canadian imports from the United States were even higher at $2.7 billion. Canada is consistently our fifth or sixth largest agricultural customer. But it is also one of our foremost competitors and the largest U.S. supplier of similar agricultural products.

The United States and Canada now have an opportunity to strengthen our special trading relationship and to reduce barriers to bilateral trade. After lengthy negotiations, we reached an agreement that establishes the world's largest free-trade area. Both nations can benefit from trade liberalization.

By opening our markets to each other our economies will prosper and our goods will become more competitive internationally. By reducing barriers and establishing rules of conduct for a broad range of economic activities, we can expect greater investment opportunities, larger markets, increased producer efficiency, higher paying jobs, and lower priced but higher quality consumer goods.

In addition, the agreement is part of a broader trade policy strategy that should reassure other nations that the United States recognizes the value of a more open world economy.

We need to enhance the strength of the world trading system by promoting liberalization on both bilateral and multilateral fronts such as the Uruguay round of the General Agreement on Tariffs and Trade (GATT).

The agreement recognizes that the achievement of major trade objectives for the agricultural sectors of both nations requires multilateral solutions. It commits the United States and Canada to work together through multilateral negotiations such as the Uruguay round to achieve, on a global basis, the elimination of all subsidies which distort agricultural trade.

The agreement provides U.S. and Canadian agricultural producers increased opportunities to market their products with no tariff barriers and fewer nontariff barriers. All tariffs between the two countries will be eliminated within 10 years, although for 20 years they may be reimposed on certain horticultural products under special circumstances. The tariff elimination for plywood is conditioned on the creation and acceptance of common plywood performance standards.

The agreement provides for semiannual consultations between the United States and Canada on agricultural issues and stipulates

that each country shall retain its rights and obligations under the GATT.

The agreement will not solve every problem. It will reduce, but not end, trade frictions. It will minimize, but not eliminate, trade distortions.

The agreement was never intended to solve all bilateral trade difficulties and we should not expect it to do so. But it is an improvement over the current situation and a bold step toward significantly freer trade between our countries.

Much agricultural trade already crosses our mutual border with Canada. It is in the interest of both countries to enhance that trade and to expand it even further. For many businesses, on both sides of the border, freer trade translates into opportunities for economic growth. The United States-Canada Free-Trade Agreement is one mechanism for turning these opportunities into realities. The agreement addresses tariffs, subsidies, and market access issues. For more far-reaching solutions to agricultural trade problems, particularly in regard to subsidies, we must look to the multilateral trade negotiations now under way in the GATT.

Mr. Chairman, that concludes my testimony, and we would be happy to answer questions.

[The prepared statement of Mr. Myers follows:]

STATEMENT BY PETER C. MYERS
DEPUTY SECRETARY OF AGRICULTURE
BEFORE THE SENATE COMMITTEE ON AGRICULTURE, NUTRITION AND FORESTRY
MAY 24, 1988

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I APPRECIATE THE OPPORTUNITY TO DISCUSS THE FREE TRADE AGREEMENT SIGNED BY PRESIDENT REAGAN AND CANADIAN PRIME MINISTER MULRONEY ON JANUARY 2.

FOR U.S. AGRICULTURE, CANADA IS BOTH A MAJOR MARKET AND A MAJOR SUPPLIER. TOTAL U.S. AGRICULTURAL IMPORTS FROM CANADA IN 1986 REACHED NEARLY $2 BILLION AND CANADIAN IMPORTS FROM THE UNITED STATES WERE EVEN HIGHER AT $2.7 BILLION. CANADA IS CONSISTENTLY OUR FIFTH OR SIXTH LARGEST AGRICULTURAL CUSTOMER. BUT IT IS ALSO ONE OF OUR FOREMOST COMPETITORS AND THE LARGEST U.S. SUPPLIER OF SIMILAR AGRICULTURAL PRODUCTS.

THE UNITED STATES AND CANADA NOW HAVE AN OPPORTUNITY TO STRENGTHEN OUR SPECIAL TRADING RELATIONSHIP AND TO REDUCE BARRIERS TO BILATERAL TRADE. AFTER LENGTHY NEGOTIATIONS, WE HAVE REACHED AN AGREEMENT THAT ESTABLISHES THE WORLD'S LARGEST FREE-TRADE AREA. BOTH NATIONS CAN BENEFIT FROM TRADE LIBERALIZATION.

BY OPENING OUR MARKETS TO EACH OTHER OUR ECONOMIES WILL PROSPER AND OUR GOODS WILL BECOME MORE COMPETITIVE INTERNATIONALLY. BY REDUCING BARRIERS AND ESTABLISHING RULES OF CONDUCT FOR A BROAD RANGE OF ECONOMIC ACTIVITIES, WE CAN EXPECT GREATER INVESTMENT OPPORTUNITIES, LARGER MARKETS, INCREASED PRODUCER EFFICIENCY, HIGHER PAYING JOBS, AND LOWER PRICED BUT HIGHER QUALITY CONSUMER GOODS.

IN ADDITION, THE AGREEMENT IS PART OF A BROADER TRADE POLICY STRATEGY THAT SHOULD REASSURE OTHER NATIONS THAT THE UNITED STATES RECOGNIZES THE VALUE OF A MORE OPEN WORLD ECONOMY.

WE NEED TO ENHANCE THE STRENGTH OF THE WORLD TRADING SYSTEM BY PROMOTING LIBERALIZATION ON BOTH BILATERAL AND MULTILATERAL FRONTS SUCH AS THE URUGUAY ROUND OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT).

THE AGREEMENT RECOGNIZES THAT THE ACHIEVEMENT OF MAJOR TRADE OBJECTIVES FOR THE AGRICULTURAL SECTORS OF BOTH NATIONS REQUIRES MULTILATERAL SOLUTIONS. IT COMMITS THE UNITED STATES AND CANADA TO WORK TOGETHER THROUGH MULTILATERAL NEGOTIATIONS SUCH AS THE URUGUAY ROUND TO ACHIEVE, ON A GLOBAL BASIS, THE ELIMINATION OF ALL SUBSIDIES WHICH DISTORT AGRICULTURAL TRADE.

THE AGREEMENT PROVIDES U.S. AND CANADIAN AGRICULTURAL PRODUCERS INCREASED OPPORTUNITIES TO MARKET THEIR PRODUCTS WITH NO TARIFF BARRIERS AND FEWER NONTARIFF BARRIERS. ALL TARIFFS BETWEEN THE TWO COUNTRIES WILL BE ELIMINATED WITHIN TEN YEARS, ALTHOUGH FOR TWENTY YEARS THEY MAY BE REIMPOSED ON CERTAIN HORTICULTURAL PRODUCTS UNDER SPECIAL CIRCUMSTANCES. THERE IS A POSSIBLE EXEMPTION FOR PLYWOOD CONDITIONED ON THE CREATION AND ACCEPTANCE OF COMMON PLYWOOD PERFORMANCE STANDARDS.

THE AGREEMENT PROVIDES FOR SEMI-ANNUAL CONSULTATIONS BETWEEN THE U.S. AND CANADA ON AGRICULTURAL ISSUES AND STIPULATES THAT EACH COUNTRY SHALL RETAIN ITS RIGHTS AND OBLIGATIONS UNDER THE GATT.

THE AGREEMENT WILL NOT SOLVE EVERY PROBLEM. IT WILL REDUCE, BUT NOT END, TRADE FRICTIONS. IT WILL MINIMIZE, BUT NOT ELIMINATE, TRADE DISTORTIONS.

THE AGREEMENT WAS NEVER INTENDED TO SOLVE ALL BILATERAL TRADE DIFFICULTIES AND WE SHOULD NOT EXPECT IT TO DO SO. BUT IT IS AN IMPROVEMENT OVER THE CURRENT SITUATION AND A BOLD STEP TOWARD SIGNIFICANTLY FREER TRADE BETWEEN OUR COUNTRIES.

MUCH AGRICULTURAL TRADE ALREADY CROSSES OUR MUTUAL BORDER WITH CANADA. IT IS IN THE INTEREST OF BOTH COUNTRIES TO ENHANCE THAT TRADE AND TO EXPAND IT EVEN FURTHER. FOR MANY BUSINESSES, ON BOTH SIDES OF THE BORDER, FREER TRADE TRANSLATES INTO OPPORTUNITIES FOR ECONOMIC GROWTH. THE U.S.-CANADIAN FREE TRADE AGREEMENT IS ONE MECHANISM FOR TURNING THOSE OPPORTUNITIES INTO REALITIES. THE AGREEMENT ADDRESSES TARIFFS, SUBSIDIES AND MARKET ACCESS ISSUES. FOR MORE FAR REACHING SOLUTIONS TO AGRICULTURAL TRADE PROBLEMS--PARTICULARLY IN REGARD TO SUBSIDIES--WE MUST LOOK TO THE MULTILATERAL TRADE NEGOTIATIONS NOW UNDERWAY IN THE GATT.

THAT COMPLETES MY TESTIMONY MR. CHAIRMAN. I WILL BE HAPPY TO ANSWER QUESTIONS.

Senator MELCHER. All right. Thank you, Peter. Ambassador Holmer, article 701 of this trade agreement states in paragraph 4: "Each Party shall take into account the export interests of the other Party in the use of any export subsidy on any agricultural good exported to third countries, recognizing that such subsidies may have prejudicial effects on the export interests of the other Party."

Ambassador, there is not any question but what the use of the Export Enhancement Program has a prejudicial effect on the export interests of Canada in terms of wheat. The chart, that I believe is courtesy of the Department of Agriculture, right there in the forefront, shows that U.S. exports of wheat dipping to a very low point in 1985-86 have now started upward, and the general conclusion that we have drawn and the Department of Agriculture has drawn and the trade has drawn is that the Export Enhancement Program has turned us around in the export of wheat.

So in reality this sentence that I just read in paragraph four of article 701 is in conflict with what we are doing.

Ambassador HOLMER. What I would like to do, if I could, Senator Melcher, first we certainly agree with you that the Export Enhancement Program has had a favorable impact on U.S. exports of wheat.

I think we disagree that it has a prejudicial impact on Canadian exports of wheat. But I would like to have Ann Veneman from the Foreign Agricultural Service respond to that question in more detail. Ann.

The CHAIRMAN. Ms. Veneman.

Ms. VENEMAN. Senator, as you know, we do currently take into account the export interests of other countries, particularly some of our trading partners including Canada, Australia and some of the others when we make decisions about the Export Enhancement Program.

When you say that this provision is in conflict with what we are currently doing, we believe it is not. It is simply a verification of what we are currently doing. It is no change from our current practice. We do take into account the interests of Canada. And that the provision simply ensures that we will continue to do so.

Senator MELCHER. I do not read that at all. I read the language here written very clearly that each party shall take into account the export interests of the other party in the use of—and I am going to substitute—Export Enhancement Program on any agricultural good exported to third countries.

Mr. MYERS. Mr. Chairman, if I could interject. We do take into account the interests of Canada in our export decisions.

Senator MELCHER. How do you do that?

Mr. MYERS. We do not target our Export Assistance, our Export Enhancement Program——

Senator MELCHER. No, no. The conflict comes in when they say, well, we want to make the sale near to the market price, nearer to the world price, and you are undercutting us by taking off $10, $12, or $15 a ton. We were willing to sell it at $6 a ton.

Mr. MYERS. Well, we do not discuss with Canada when we make these types of sales, and they do not discuss with us when they do it.

Senator MELCHER. This says you shall.

Ms. VENEMAN. During the negotiations, one of the very, very contentious issues that came up was this issue of a desire on the part of the Canadians to have prior consultations on the use of our Export Enhancement Program.

We said that that was not possible to do. They did not consult with us on their pricing practices under the Canadian Wheat Board, and we were not willing to give them prior consultations absent consultations on their pricing practices.

Therefore, it was agreed that this provision would go into the agreement which says each country shall take into account. Now it does not say that you have to consult. It simply says you have to take into account.

It is a practice, as I said before, which we do anyway. We always take into account. We always assess the——

Senator MELCHER. Well, thank you very much. I know time is limited. And, Mr. Chairman, I am just serving notice that this sentence is completely unacceptable to me, and I think it should be completely unacceptable to the committee.

But I want to get on to a second point that I think is also unacceptable.

The CHAIRMAN. I think Ambassador Holmer did have a comment.

Ambassador HOLMER. If I can take it from somebody's time other than Senator Melcher's, and I will be very quick. I sense we are all on the same wavelength as to what the policy ought to be. You are just concerned as to whether or not the FTA could be interpreted in a way that would do something that would be inconsistent with what we want that policy to be.

What we would propose to you is that we include in the statement of administrative action, which will accompany the implementing bill, a specific statement that would say this article will not require a change in the administration of the Export Enhancement Program to third countries.

The United States currently takes into account the export interests of Canada when conducing the EEP for sales to third countries. And I believe that would address your concern, Senator. I hope so.

Senator MELCHER. Well, I do not think in the face of the explicit language that is in that particular sentence that it would satisfy it at all. I think it is necessary for this committee to act sensibly, reasonably, and that is that sentence is simply unacceptable to me. I think there is no other way to interpret it than the manner in which I interpreted it.

Ambassador HOLMER. Well, I just want to assure you that we are going to administer that sentence the way you want us to.

Senator MELCHER. I cannot rely on that.

Ambassador HOLMER. And we will include it in the statement of administration action which the Congress will approve or disapprove as a part of the implementing bill. And it will have the effect of law.

Senator MELCHER. That is where we are going to get our shot; I am sure of that. But I want to get on to the second point in article 701. And that is in paragraph 5: "Canada shall exclude from the

transport rates established under the Western Grain Transportation Act agricultural goods originating in Canada and shipped via west coast ports for consumption in the United States of America."

And that sentence also bothers me because they are not shipping wheat to the west coast. The wheat that we buy from Canada is through Thunder Bay, I believe. Anyway, it is east. And what this smoke screen sentence is supposed to mean, I do not know.

But what I think it does, it says it is OK to ship it to the west coast, and then it can be exported through terminals in the United States. What I think that does is simply transfer some Canadian wheat for export replacing American wheat, replacing Montana wheat, for instance.

And I do not know why we need any smoke screen in this agreement. The sentence leads you to believe it is flour we are talking about. It is not flour we are talking about at all. What were you trying to talk about?

Ms. VENEMAN. This provision of the agreement relates to an export subsidy. As you know, the agreement eliminated all export subsidies between the two countries. The difference between the Western Grain Transportation Act subsidies to west coast ports and east coast ports is that the subsidies through west coast ports are conditioned upon export, and therefore are export subsidies.

Through east coast ports, they are domestic subsidies. They are across-the-board subsidies that are like a deficiency payment. They are not paid conditioned upon export. Therefore, the elimination of transportation subsidies, the WGTA subsidies, for U.S. destination through west coast ports was consistent with the overall portions of the agreement which provided for the elimination of export subsidies.

You may ask the question why then does the agreement include a provision specifying the elimination of this particular export subsidy. The reason it was specified in the agreement is that there was some discussion during the negotiations that Canada may attempt to make the WGTA subsidies through west coast ports also an across-the-board or domestic subsidy. And therefore, to ensure against having that subsidy also put on as an across-the-board subsidy and therefore eligible for destination to United States it was decided to put a specific provision in the agreement that would prohibit WGTA subsidies through west coast ports.

Ambassador HOLMER. Basically where you are here is you have export subsidies going to the West and domestic subsidies going to the East. We were able to achieve the elimination of those export subsidies going to the West, an achievement that we would not have been able to have outside of this agreement, and we regard that as being a positive development, an improvement over the current situation.

Senator MELCHER. If it addresses flour, which it seems to, because it says for consumption in the United States, then why should it not apply to wheat going East?

Ambassador HOLMER. Because the subsidies that are provided to the wheat going east are not contingent upon export. They are, therefore, under the rules domestic subsidies, and we did not want to put our domestic subsidies on the table with their domestic subsidies as a part of these negotiations.

We also overall wanted to reserve these issues for the Uruguay round of trade negotiations and not have the United States and Canada both unilaterally disarmed in this area.

Senator MELCHER. Mr. Chairman, I only have one other point, and I am just going to make an observation. The Ambassador has included in his statement a question on energy supplies and secure market access for Canadian energy exports to the United States.

Why it was put in here I do not know except that he maintains that it is advantageous to farmers. Let me point out that this is a very sore point that we are reviewing in the Energy Committee, and the facts are that the Canadians sell oil or natural gas into the United States under favorable terms, favorable conditions. That is when the price is higher here than what they can get domestically.

And when it is the other side, when it is limited amounts available for their use and our use, too, then they just simply withhold it. It is not anything that has anything to do with agriculture. I am in a State that borders Canada for some 800 miles, and we do import oil and natural gas from time to time, and generally pretty steadily.

But the facts are that they only come out of Canada when the price is higher in the United States or when it is the same. When there is a shortage, you cannot get it out of them any way. They will just cut it off.

Ambassador HOLMER. If I could, Senator, and I do not want to be argumentative about this, but the reason why we think the energy portion is so important to the United States and to energy consumers in Montana is because it now does preclude the Canadians from continuing discriminatory pricing practices with respect to energy exports to the United States, and we think that is of enormous benefit to the United States, not just agriculture.

Agriculture is a significant beneficiary. But consumers, both businesses and individuals throughout the United States.

Senator MELCHER. We have a problem with it. Let me tell you. We will address that in the Energy Committee, however.

The CHAIRMAN. Senator Boschwitz.

Senator BOSCHWITZ. On the WGTA subsidies, or so-called Crow's Nest subsidies, that my friend from Montana is talking about, I got the impression that removing those subsidies with respect to goods that come in to the Western part of the United States was going to be quite a benefit to us, particularly with respect to providing feed and other supplements for cattle out that way. I kind of looked forward to that.

The subsidies that my friend from Montana is talking about, without this treaty, would stay in place very obviously, the ones moving east and the ones moving west. With regard to the subsidies moving west, they will now apply to exports through Canadian ports, but they cannot bring grain down through United States ports and apply that subsidy, as I understand it. Is that correct?

Mr. MYERS. That is correct.

Ambassador HOLMER. That is correct, Senator.

Senator BOSCHWITZ. In the port and currently as grain came from Canada to United States ports, some of it stuck, so to speak. Some of it stayed in our Northwestern areas. I think that some

markets that had been taken by this grain, I would say to my friend from Montana, are now going to be available.

Senator MELCHER. That may apply to feed grain, but it certainly is not going to apply to wheat that is brought across and then goes to Portland and then is exported.

Senator BOSCHWITZ. No. It cannot go through. Those subsidies cannot apply when it goes through American ports, as I understand it.

Senator MELCHER. If it is for export?

Senator BOSCHWITZ. No. The Crow's Nest subsidies cannot apply if it goes from Canada and comes down in through the United States port and goes out. It can apply if it goes out through Canadian ports.

The CHAIRMAN. Is that correct?

Ms. VENEMAN. The subsidy is eliminated if it is for consumption in the United States

Senator BOSCHWITZ. Pardon me. I did get it wrong. So that I am right in the sense that it opens up American markets, but you are right in the sense that it——

Senator MELCHER. For wheat that is going to be exported out of Portland.

Senator BOSCHWITZ. However, those subsidies——

Senator MELCHER. From Manitoba or Saskatchewan. It would apply.

Senator BOSCHWITZ. I am also correct when I say those subsidies—without disagreement—are certainly going to be in effect, in any event. So that we have not been terribly disadvantaged by the FTA in this regard.

I know that you have been working with the Wheat Growers and with other commodity groups to reduce their fears. Have you made any progress in that regard and have any of them changed their positions?

Ambassador HOLMER. Well, yes, we have made some significant progress with the Wheat Growers, Senator Boschwitz. I just quote briefly from a letter to the chairman from the National Association of Wheat Growers, indicating that, "It now appears that several ambiguities in the text of the Agreement will be clarified in the Statement of Administration Action, in implementing legislation and by other means. If all these clarifications occur, they will mark significant improvements in the FTA's implementation, and will generally continue current safeguards against undue Canadian Wheat Board market dominance."

My understanding is the Wheat Growers who were opposed to the agreement have now withdrawn their opposition as a result of the improvements that have been made.

The CHAIRMAN. I think without objection we will put the whole letter in the record at this point.

[The letter from the National Association of Wheat Growers follows:]

National Association of Wheat Growers
415 Second Street, N.E., Suite 300, Washington, D.C. 20002, (202) 547-7800

May 24, 1988

Honorable Patrick Leahy, Chairman
Senate Committee on Agriculture, Nutrition, and Forestry
328A Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

It is no secret that U.S. wheat farmers have had grave reservations about the grains provisions of the U.S.-Canada Free Trade Agreement. These reservations have not stemmed from opposition to the concept of reducing trade barriers with our northern neighbor, but from our belief that the Agreement's terms lack balance where wheat and other grains are concerned, and that the FTA could substantially strengthen the market power of the Canadian Wheat Board, an export monopoly, by weakening U.S. laws that currently offset the CWB's advantages. It now appears that several ambiguities in the text of the Agreement will be clarified in the Statement of Administrative Action, in implementing legislation and by other means. If all these clarifications occur, they will mark significant improvements in the FTA's implementation, and will generally continue current safeguards against undue CWB market dominance.

At present, Canadian wheat imports are not large, relative to the overall U.S. domestic market; in 1986/87, they amounted to about 400,000 metric tons, and may be somewhat higher this year. However, Canadian imports have risen quite rapidly in the past few years, and for some classes of wheat -- particularly durum -- import penetration has reached potentially injurious levels in relation to U.S. production and consumption.

As a quasi-government monopoly, the Canadian Wheat Board enjoys some advantages that will be apparent to anyone who reflects on why this country passed its antitrust laws. In its 1986 report on "Trade Policies and Market Opportunities for U.S. Farm Exports," the U.S. Department of Agriculture said: "By virtue of the monopoly power over wheat exports entrusted to the Board by the Government, the Board is in a unique position to adopt lower than posted price levels on its sales to certain key markets when it wishes either to initiate new business or expand its market share." That is to say, the posted price may or may not be the selling price.

In addition, Canadian wheat shipped to the U.S. through Thunder Bay benefits from a transportation subsidy -- the so-called "Crow's Nest" rail rates -- that at recent exchange rates amounts on average to about 50¢ per bushel. Other non-market factors are potentially at work too: Notably, the market-based pricing system in the U.S. pays premiums for higher

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protein content in some classes of wheat, while the governmentally administered pricing system in Canada does not reward protein content to the same degree. Hence farmers in Canada living near the U.S. border might have an incentive to sell into this country rather than at home, simply because their government was failing to pay the premiums dictated by market forces. At present the Canadian Wheat Board does not grant export permits to individual Canadian farmers, but nothing in the FTA requires this discipline to continue.

It has seemed to us that, given the factors described above, it is appropriate for the U.S. to retain some legal recourse -- a political counterweight -- in case it was needed. The most effective counterweight in the recent past appears to have been Section 22 of the Agricultural Adjustment Act of 1933, even though it has not actually been used to put quotas on wheat imports since 1974. Section 22 allows quantitative restrictions when agricultural imports are interfering with a U.S. support program.

Apart from its failure to end Thunder Bay transportation subsidies or require immediate access to the Canadian market for U.S. grains and products, the most significant flaw in the FTA initially seemed to be its weakening of Section 22. The Agreement creates a new condition for invoking Section 22 or other quantitative restrictions on grains: Import quotas could be used "if [grain] imports increase significantly as a result of a substantial change in either Party's support programs for that grain." (Emphasis added.)

The underscored phrases in the above quotation beg several questions. Just what is a "substantial change"? Does it mean that absent a 180-degree turn in U.S. farm policy, no import limits could be invoked? How high a level of imports is "significant"? Does the phrase "as a result" mean other contributing factors would be excluded?

One interpretation of the new condition is that, absent the kind of fundamental changes in farm policy that are unlikely to occur in the near term, and absent tremendous surges in Canadian wheat shipments to the U.S., Section 22 is a dead letter. If such an interpretation were adopted, the present informal deterrents to aggressive CWB sales would be gone, and U.S. farmers would be competing directly with a creature of the Canadian government whose marketing and pricing practices have been aptly described as a "black box."

Fortunately, such an unfavorable interpretation is not required by the FTA's text. Indeed, the language can facilitate a more favorable reading. It is also fortunate that the Administration has agreed to adopt such a favorable reading, one which in our view will largely maintain the integrity of Section 22 and provide other benefits. The Administration's undertakings in this regard do not, of course, guarantee that there will be no imports of Canadian wheat; imports are occurring now, without the FTA. But the undertakings on Section 22 and a few other matters do constitute a significant change in the common understanding of the FTA and its implications for the wheat industry -- a change that will leave wheat growers in a considerably more favorable position than if the less

favorable interpretation had prevailed.

Excerpts from the Administration's draft Statement of Administrative Action are attached to this statement. Of particular interest to us are statements made in the explanations of Articles 701 and 705. Taking Article 705 first, since it deals with quantitative restrictions, we note with approval the statements which --

- Confirm a broad interpretation of what a "substantial change" is, stressing that a "broad universe" of changes would qualify, and that such changes need not be major changes in policy.

- Cite two examples of what would amount to a "substantial change": (1) changes by Canada in its export permit system to freely grant permits to individual Canadian farmers regardless of market conditions, and (2) a change in U.S. loan rates so that instead of being reduced 5 percent, the loan rate fell 3 percent.

- Clarify that a "significant increase" does not require any particular level of imports, or penetration of a particular percentage of the total U.S. market, in order to trigger a Section 22 action

- Clarify that other factors besides a "substantial change" in support programs might contribute to a significant increase in imports, and that the substantial change need not be the largest single cause in order for Section 22 to be invoked.

- Make clear that substantial changes in support programs that happened prior to the FTA could also trigger a Section 22 action

Under Article 701, the Administration has made statements which --

- Explain that, pursuant to Canada's pledge not to export wheat at less than its "acquisition price," the U.S. would review any manipulation by Canada of its initial payment to farmers to determine whether such an action was intended to artificially depress the apparent acquisition price and hence justify a sort of legalized dumping

- Confirm its intent to enter consultations with Canada to determine the Canadian Wheat Board's acquisition price for grains shipped to the U.S., with a transparent price setting mechanism being the goal

- Clarify that no change in the administration of the Export Enhancement Program will be required by the FTA

In addition, the Administration has agreed to an exchange of letters with members of Congress which, subject to agreement by legislators, would be included in Committee reports and which would --

- Note that Canada's import licensing system may be illegal under the General Agreement on Tariffs and Trade, and that since the U.S. has retained its GATT rights under the FTA, various actions could be taken

against the licensing system.

- o Express the hope that good faith on both sides would preclude the need for any such action, and note that good faith on the part of Canada will be evidenced in part by the amount of wheat shipped into the U.S. relative to past years, and by whether Canada continues its present restrictions on granting export permits to individual Canadian farmers.

These understandings, if all finally adopted, are quite significant. As we have stated before, they do not provide any guarantees that Canadian wheat will not enter the U.S. But they do tend to reinforce the integrity of Section 22 as an operative statute, a potent remedy against injurious levels of imports and a guarantor of U.S. support programs. We appreciate the good faith and spirit of cooperation in which the Administration has reached the understandings outlined above, and the strong interest of many members of Congress, including several members of this Committee, which contributed to these understandings.

NAWG will continue to monitor closely the amount of Canadian wheat entering the U.S.. We will continue to press for further progress in reducing distortions that may lead to increased imports for reasons unrelated to market forces; we will particularly seek progress in various consultations which are to be undertaken pursuant to the FTA. And if it becomes necessary, we will work with our members and state associations in seeking redress under the laws of the United States -- not only Section 22, but also countervailing duty and anti-dumping laws, as well as other relevant statutes.

We appreciate the opportunity to present our views to this Committee, and to explain in detail the significant improvements that have been made in the implementation of the U.S.-Canada Free Trade Agreement. We also respectfully request that this letter be made a part of the Committee's hearing record.

Sincerely,

Carl F. Schwensen
Executive Vice President

Excerpts from the Administration's draft Statement of Administrative Action follows:

DRAFT

CHAPTER SEVEN: AGRICULTURE

A. Summary of FTA Provisions

1. Agricultural Subsidies

Under Article 701(1), the United States and Canada have agreed to work together to achieve, on a global basis, the elimination of all subsidies which distort agricultural trade through multilateral negotiations such as the Uruguay Round. This provision is consistent with the U.S. proposal for agricultural reform which has been tabled in the Uruguay Round negotiations.

Article 701(2) prohibits each country from introducing or maintaining export subsidies on agricultural goods exported to the territory of the other country.

Article 701(3) provides that neither country, nor any public entity that it establishes or maintains, shall sell agricultural goods in the other country at a cost below the acquisition price plus handling, storage, and other costs.

Article 701(4) requires each country to take the export interests of the other country into account in using export subsidies on agricultural goods to third countries.

As part of the commitments on agricultural subsidies, under Article 701(5), Canada agreed to exclude from the transport rates established under the Western Grain Transportation Act (WGTA) agricultural goods originating in Canada and shipped via west coast ports for consumption in the United States.

2. Special Provisions for Fresh Fruits and Vegetables

Article 702 provides that either country for the next twenty years, under certain conditions, may apply a temporary duty on designated fresh fruits and vegetables. However, the application of such a duty cannot cause the total duty on these products to exceed the lesser of the most-favored-nation (MFN) duty that was in effect for the corresponding season prior to the Agreement or the then current MFN duty.

3. Market Access for Agriculture

Article 703 provides that both countries will work together to improve access to each other's markets through the elimination or reduction of import barriers.

4. Market Access for Meat

Article 704, in general, prohibits either country from imposing quantitative import restrictions on the other's meat goods, with

Article 704, in general, prohibits either country from imposing quantitative import restrictions on the other's meat goods, with an exception to prevent the frustration of actions taken regarding meat imports from third countries should the other country has failed to take equivalent action against third country meat imports.

5. Market Access for Grain and Grain Products

Under Article 705, Canada has agreed to remove its import permit requirements for the importation of U.S. wheat and wheat products, oats and oat products, or barley and barley products when the level of government support provided by the United States to the particular grain is less than or equal to the level of government support provided by Canada to that grain. Annex 705.4 sets forth the methodology for calculating each country's level of government support.

In addition, under paragraph 5 of Article 705, the United States and Canada have reserved their rights to impose, consistent with the other provisions of the Agreement, quantitative restrictions or import fees on imports of certain specified Canadian grains or grain products, for purposes of restricting the importation of a grain or of a grain product due to its content of that grain, when imports of the particular grain increase significantly as a result of a substantial change in the U.S. or Canadian support programs for that grain. The specified grains are wheat, oats, barley, rye, corn, triticale or sorghum.

6. Market Access for Poultry and Eggs

Under Article 706, together with Annex 706, Canada has agreed that if Canada maintains import quotas on certain poultry, poultry products, eggs or egg products, then those quotas will not be below certain minimum global levels.

7. Market Access for Sugar-Containing Products

Under Article 707, the United States has agreed not to impose quantitative import restrictions or import fees on Canadian products containing ten percent or less sugar by dry weight for the purpose of restricting the sugar content of such products.

8. Technical Regulations and Standards for Agricultural, Food, Beverage and Certain Related Goods

Article 708, in combination with Annex 708.1, provides general principles and certain commitments regarding technical regulations and standards governing trade between the United States and Canada in agricultural, food, beverage and certain related goods. To further the implementation of Article 708 and

the schedules in Annex 708.1, Article 708 provides for the establishment of eight working groups composed of representatives of both countries on the following subjects of agricultural trade: animal health; plant health, seeds and fertilizers; meat and poultry inspection; dairy, fruit, vegetable and egg inspection; veterinary drugs and feeds; food, beverage and color additives and unavoidable contaminants; pesticides; packaging and labelling of agricultural, food, beverage and certain related goods for human consumption.

The Article also provides for the establishment of a joint monitoring committee to monitor the progress of the various working groups to ensure the timely implementation of Article 708 and Annex 708.1. The joint monitoring committee will report the progress of the working groups to the Secretary of Agriculture for the United States, the Minister of Agriculture for Canada, such other Cabinet-level officers or Ministers as may be appropriate, and to the Commission established pursuant to Chapter Eighteen of the FTA.

9. Consultations

The countries have agreed in Article 709 that they will consult with each other on agricultural issues at least semi-annually and at such other times as they may agree.

10. International Obligations

Under Article 710, the two countries retain their respective rights and obligations with respect to agricultural, food, beverage and certain related goods under the General Agreement on Tariffs and Trade (GATT) and agreements negotiated under the GATT, unless otherwise specifically provided for in Chapter Seven.

B. Administrative Action

1. Agricultural Subsidies

a. Implementing Bill. No legislative provisions are required or appropriate to carry out the provisions of Article 701.

b. Agency Regulations. No regulatory changes are contemplated to implement the provisions of Article 701.

c. Agency Procedure or Practice. Appropriate agencies will continue their work in the Uruguay Round of multilateral negotiations in concert with Canada toward the elimination of all subsidies that distort agricultural trade. The Department of Agriculture will monitor agricultural imports from Canada to

ensure fulfillment of Canada's commitments under Article 701. This Article will not require a change in the administration of the Export Enhancement Program (EEP) to third countries. The United States currently takes into account the export interests of Canada when conducting the EEP for sales to third countries.

In connection with paragraph 3 of Article 701, the application of the term "acquisition price" in that paragraph to sales by public entities such as the Canadian Wheat Board (CWB) is not specifically delineated, although such sales are covered by that paragraph. Of particular concern is determining the "acquisition price" of wheat in the context of the initial payment and final payment system used by the CWB. Any manipulation of the pricing system by the CWB would be subject to review by the United States to ensure that Canada's obligations under paragraph 3 of Article 701 were not being circumvented.

In order to implement Article 701(3), the United States also intends to pursue consultations with Canada regarding the price setting policy of the CWB as it affects goods exported to the United States. These consultations will be directed toward establishing a method to determine the price at which the CWB is selling agricultural goods to the United States and the CWB's acquisition price for those goods. The ideal method would be a public price setting mechanism transparent to the U.S. government, producers and processors.

In addition, another area of concern could be sales for export by Canadian public entities of agricultural goods such as eggs to private firms, where the private firm ships only a component of such goods to the United States. The Department of Agriculture will, pursuant to Article 701(3), monitor such sales to ensure that the sale price of the Canadian public entity would not be below cost.

2. Special Provisions for Fresh Fruits and Vegetables

a. Implementing Bill. Section ___ of the implementing bill authorizes the President, under certain circumstances, to impose a temporary duty on the importation of certain fresh fruits or vegetables from Canada.

b. Agency Regulations. The Secretary of Agriculture will issue regulations to implement the provisions of section ___, primarily to define the various terms of the Agreement.

c. Agency Procedure or Practice. The Department of Agriculture will monitor the planted acreage in the United States of the designated fresh fruits and vegetables and, working with the United States Customs Service, will monitor the import price of the designated fresh fruits and vegetables as appropriate, to determine whether the conditions specified in Article 702 have

occurred. The Department of Agriculture will also monitor the point of shipment price of the designated fresh fruits and vegetables as appropriate for purposes of determining whether any temporary duty in place would have to be eliminated under the provisions of Article 702.

3. Market Access For Agriculture

a. Implementing Bill. No legislative provisions are required or appropriate to carry out the provisions of Article 703.

b. Agency Regulations. No regulatory changes are contemplated to implement the provisions of Article 703.

c. Agency Procedure or Practice. Under Article 703, the countries are required to work together to improve access to each other's markets through the elimination or reduction of import barriers, in order to facilitate trade in agricultural goods. As Article 102(e) stresses generally, this Agreement is a beginning rather than a conclusion. While the United States has succeeded in substantially liberalizing trade with Canada, the FTA does not eliminate all trade barriers. But with respect to any remaining trade barriers, the Agreement lays the foundation for further bilateral and multilateral cooperation to expand and enhance benefits under the Agreement.

Like several other chapters of the Agreement (see, e.g., Articles 608 on technical standards, 1307 on government procurement, 1405 on services, and 1907 on the subsidies working group), Article 703 underscores the relevance of the principles contained in Article 102(e) to the chapter on agriculture. While Chapter Seven is a very constructive and worthwhile beginning, it certainly is not a panacea for agricultural trade barriers.

For example, under Article 706 of the Agreement, the United States obtained a useful liberalization of existing Canadian import quotas on chickens, turkeys, eggs, and their products. The commercial benefits of this achievement are reflected, for example, by the support for the Agreement by the Agricultural Technical Advisory Committee for Trade in Poultry and Eggs. However, the United States has not yet succeeded in eliminating these quotas, which still restrict U.S. opportunities to sell poultry, eggs and their products in the Canadian market.

Consistent with both the letter and spirit of Article 703, the United States fully intends to use its mandate for further negotiations to seek to eliminate the remaining agricultural import barriers. In addition to the Uruguay Round negotiations, the United States intends to seek further liberalization with respect to agricultural import barriers as a high priority in our bilateral relationship with Canada. Particularly where an unfavorable imbalance in market opportunities remains after the

Agreement enters into force (as with respect, for example, to Canada's quantitative restrictions on imports of eggs and egg products), the United States will attach the greatest importance to attaining this objective.

4. Market Access for Meat

a. Implementing Bill. Section ___ of the implementing bill amends the Meat Import Act of 1979 (Section 2 of P.L. 88-482) to delete Canada from the calculation of the quantity of meat articles that may be imported without triggering an import quota under the Act; adjusts the minimum quota amount to reflect the removal of Canada from the calculation; and provides the President, under limited circumstances, the authority to impose import restrictions on Canadian meat articles. Section ___ provides that the rules of origin applicable to determining whether meat is a product of Canada for tariff treatment purposes will also apply for purposes of the Meat Import Act of 1979.

b. Agency Regulations. No regulatory changes are contemplated to implement the provisions of Article 704.

c. Agency Procedure or Practice. The Department of Agriculture will apply the provisions of Chapter Three including the anti-circumvention rule of Article 301(3)(c) and the transshipment rule of Article 302 when determining whether meat articles originate in Canada for purposes of Article 704. For purposes of determining under Article 704 whether imports of meat articles from Canada are frustrating actions taken against meat imports from third countries, the President will consider, for example, if imports of meat goods originating in Canada increased significantly as a result of displacement of those goods within the Canadian market by an increase of imports into Canada of third country meat goods.

5. Market Access For Grain and Grain Products

a. Implementing Bill. Section ___ of the implementing bill amends section 22 of the Agricultural Adjustment Act of 1933, as amended (7 U.S.C. §624) to authorize the President to exempt products of Canada from section 22 import restrictions pursuant to paragraph 5 of Article 705.

b. Agency Regulations. No regulatory changes are contemplated to implement the provisions of Article 705.

c. Agency Procedure or Practice. The implementation of paragraph 4 of Article 705 and Annex 705.4 will be accomplished by making changes in agency practice in order to collect and analyze data on U.S. and Canadian levels of government support in accordance with Annex 705.4. In addition, the Department of Agriculture will select representatives to the working group

provided for in Annex 705.4. Among other things, this working group will assist in the refinement of the formulas outlined in Annex 705.4.

Regarding paragraph 5 of Article 705, under current U.S. law, the provision under which quantitative restrictions or import fees would most likely be imposed is section 22 of the Agricultural Adjustment Act of 1933, as amended ("section 22"). Accordingly, before any import restriction could be imposed on a particular grain or grain product pursuant to section 22, the President would first have to determine that the requirements of section 22 were met. That is, it would first be necessary to determine that the particular article was being, or was practically certain to be, imported under such conditions and in such quantities as would render or tend to render ineffective, or materially interfere with, a U.S. price support or stabilization program. Only after making this determination would the United States, under Article 705(5), look to see whether, in the case of Canada, imports of the particular article have increased significantly as a result of a substantial change in the support programs for the relevant grain in either the United States or Canada.

In determining whether a change in the support programs of the United States or Canada for one of the specified grains is a "substantial change" within the meaning of Article 705(5), the President would not determine that a change that has a material market impact is an insubstantial change simply because the change is a relatively minor change in policy. A minor change in policy can nonetheless be a substantial change in a program.

A broad universe of changes could be "substantial" within the meaning of Article 705(5). For example, under the right conditions both of the following instances could be considered to be a "substantial change" within the meaning of Article 705(5): (1) a change in the current Canadian policy regarding the distribution of permits to export grain into the United States such that private entities were freely granted permits regardless of market conditions, and (2) a change in the United States schedule of reductions in price support loan rates under which the loan rate for a crop were reduced three percent from the loan rate for the previous crop rather than being reduced five percent, as the market had anticipated.

The term "increase significantly" would not be read to require that imports of a grain or grain product from Canada must reach a particular portion of total U.S. demand for the particular grain or grain product. Similarly, the term "increase significantly" would not be read to require a particular level of imports in absolute terms. For example, a small increase in absolute terms of such imports could constitute a "significant" increase in such imports relative to previous levels of imports from Canada.

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The phrase "as a result of" in Article 705(5) would not be read to require the absence of other factors that might contribute to a significant increase in imports, nor is it necessary for the "substantial change" in support programs to be the largest single contributing factor. Furthermore, there could be a delay between the time a substantial change occurred in the support program and the resulting significant increase in imports, including where the significant increase in imports results from a substantial change to support programs occurring before the FTA enters into force.

6. Market Access for Sugar-Containing Products

a. Implementing Bill. Section ___ of the implementing bill amends section 22 of the Agricultural Adjustment Act of 1933, as amended (7 U.S.C. §624) to authorize the President to exempt products of Canada from section 22 import restrictions pursuant to Article 707.

b. Agency Regulations. No regulatory changes are contemplated to implement the provisions of Article 707.

c. Agency Procedure or Practice. No changes to agency procedure or practice are contemplated. Current import quotas on sugar containing products maintained for purposes of restricting the sugar content of such goods already exclude products containing ten percent or less sugar by dry weight. The incentive to import a product because it contains world price sugar disappears at the ten percent sugar content level. This provision also will not affect current import quotas on other products that may contain sugar that are maintained for other purposes, such as those to restrict the dairy product content of such products.

7. Technical Regulations and Standards for Agricultural, Food, Beverage and Certain Related Goods

A number of legislative, regulatory and agency procedure and practice changes will be needed to implement the provisions of Article 708 and, more particularly, the various schedules to Annex 708.1. The following discussion is organized in the order of those schedules.

SCHEDULE 1: Feeds

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 1. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 1. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure or Practice. Pursuant to Schedule 1, the appropriate agencies, including the Department of Agriculture and the Food and Drug Administration, will work together with their Canadian counterparts to harmonize or to make equivalent both federal and state requirements concerning the content, manufacture, testing, adulteration, and labeling of feeds. With respect to state provisions regarding feeds, the appropriate agencies will work through the National Association of State Departments of Agriculture and the Association of American Feed Control Officials in the specified areas.

SCHEDULE 2: Fertilizers

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 2. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 2. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure or Practice. Schedule 2 lists the government requirements and exemptions from those requirements that both countries have agreed to work together to harmonize or to make equivalent with respect to the labeling, testing, and content of fertilizers and pesticides that are allowed in fertilizers. The implementation of this Schedule will be accomplished by the appropriate agencies, including the Department of Agriculture and the Environmental Protection Agency, working with their Canadian counterparts in the specified areas. With respect to state provisions regarding fertilizers, the appropriate agencies will work through the National Association of State Departments of Agriculture and the Association of American Plant Food Control Officials in the specified areas.

SCHEDULE 3: Seeds

a. Implementing Bill. Schedule 3 requires the removal of the origin-staining requirements for imported Canadian alfalfa and clover seeds. This will be accomplished by amending the Federal

Seed Act (7 U.S.C. 1582(e)) in section ___ of the implementing bill.

b. Agency Regulations. In concert with the amendment to the Federal Seed Act, the Department of Agriculture will amend 7 C.F.R. Part 201.

c. Agency Procedure or Practice. This Schedule also provides that both countries will work together to enable Canadian seed imported into the United States to be governed by uniform regulatory requirements, and will maintain mutual recognition of each other's seed variety certification and testing methods. These provisions will be implemented by the appropriate agencies working with their Canadian counterparts. With respect to state provisions regarding seeds, the appropriate agencies will work through the National Association of State Departments of Agriculture and the American Association of Seed Control Officials in the specified areas.

SCHEDULE 4: Animal Health

a. Implementing Bill. In order to implement this Schedule, section ___ of the implementing bill amends 19 U.S.C. §1306(a) to enable the Secretary of Agriculture to establish regulations that would allow the importation of ruminants and swine and the fresh, chilled and frozen meat from areas of Canada free of foot and mouth disease and rinderpest, even if other areas in Canada may have foot and mouth disease or rinderpest. No other legislative provisions are currently required or appropriate to carry out the provisions of Schedule 4. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation. Section ___ amends 21 U.S.C. §152 to enable the Secretary of Agriculture, when the conditions of Article 708(3) are met, to issue regulations that allow the entry into the United States of certain veterinary biologics without a permit issued by the Secretary.

b. Agency Regulations. The Department of Agriculture will not exercise the authority provided by the amendment to 19 U.S.C. §1306(a) to permit the importation from disease free areas of Canada until the agreement contemplated by Schedule 4 regarding foot and mouth disease and rinderpest is reached with Canada. Similarly, the Department of Agriculture will not exercise the authority provided by the amendment to 21 U.S.C. §152 until the Department has determined that the appropriate Canadian system is harmonized with or equivalent to that of the United States. No other regulatory changes are currently needed to implement the provisions of Schedule 4. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure and Practice. The Department of Agriculture will work with its Canadian counterparts toward harmonization or equivalence in the specified areas and to fulfill the other provisions of the Schedule.

SCHEDULE 5: Veterinary Drugs

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 5. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 5. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure and Practice. The appropriate agencies, including the Department of Agriculture and the Food and Drug Administration, will work with their Canadian counterparts in the specified areas.

SCHEDULE 6: Plant Health

a. Implementing Bill. Section ___ of the implementing bill amends 7 U.S.C. § §150, 154, 156, 158, and 2803 to enable the Secretary to, where possible, harmonize or make equivalent U.S. and Canadian plant inspection regulations. No other legislative provisions are currently required or appropriate to carry out the provisions of Schedule 6. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. Department of Agriculture regulations will have to be amended to implement procedures to protect the health of plants in Canada where such plants are grown in Canada but not the United States. No other regulatory changes are currently needed to implement the provisions of Schedule 6. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure and Practice. The Department of Agriculture will work with its Canadian counterparts in the specified areas.

SCHEDULE 7: Pesticides

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 7. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 7. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure and Practice. The appropriate agencies, including the Department of Agriculture, the Environmental Protection Agency and the Food and Drug Administration, will work with their Canadian counterparts in the specified areas.

SCHEDULE 8: Food, Beverage, and Color Additives

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 8. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 8. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure or Practice. The appropriate agencies, including the Food and Drug Administration, will work with their Canadian counterparts in the specified areas.

SCHEDULE 9: Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 9. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. The Department of Health and Human Services, Food and Drug Administration regulations will be amended to reflect the fact that "canola oil," as well as "low erucic acid rapeseed oil," are common and usual names of the oil that is extracted from canola seed and that such oil contains less than two percent erucic acid.

c. Agency Procedure or Practice. The appropriate agencies, including the Food and Drug Administration, will work with their Canadian counterparts in the specified areas.

SCHEDULE 10: Meat, Poultry, and Egg Inspection

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 10. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 10. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure or Practice. The Department of Agriculture will work with its Canadian counterparts in the specified areas.

SCHEDULE 11: Dairy, Fruit, and Vegetable Inspection

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 11. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 11. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure or Practice. The Department of Agriculture will work with its Canadian counterparts in the specified areas.

SCHEDULE 12: Unavoidable Contaminants in Foods and Beverages

a. Implementing Bill. No legislative provisions are currently required or appropriate to carry out the provisions of Schedule 12. Any future agreement that may be contemplated on harmonization or equivalence in the specified areas that would require a statutory change would of course be contingent on the passage of the appropriate legislation.

b. Agency Regulations. No regulatory changes are currently needed to implement the provisions of Schedule 12. However, some regulatory changes may be needed in the future as agreement is reached on harmonization or equivalence in the specified areas.

c. Agency Procedure or Practice. The appropriate agencies, including the Food and Drug Administration, will work with their Canadian counterparts in the specified areas.

WORKING GROUPS

It is currently anticipated that a representative of the Foreign Agricultural Service, United States Department of Agriculture, will be a member of each of the working groups established pursuant to Article 708. In addition, it is anticipated that the other U.S. members of the working groups will be comprised of technical experts and representatives of other appropriate federal agencies. These working groups will encourage participation from representatives of state departments of agriculture, other associations responsible for standards and regulations, and interested groups in the private sector.

7. Consultations

a. Implementing Bill. No legislative provisions are required or appropriate to carry out the provisions of Article 709.

b. Agency Regulations. No regulatory changes are needed to implement the provisions of Article 709.

c. Agency Procedure or Practice. It is anticipated that the consultations will be conducted on behalf of the United States by the Secretary of Agriculture or the Secretary's designee.

Senator BOSCHWITZ. I understand that Canada has been shipping wheat to the United States in recent years, 400,000 tons which is about 14.5 million bushels, about 1 percent, no, even less, one-half of 1 percent of our production, something like that, has come down into the United States, a more significant percentage when applied to Durum. Have we been shipping any wheat to Canada, first, I ask?

Ms. VENEMAN. As far as I know, we have not been shipping any wheat to Canada. Of course, they have this licensing system, as you know, which has precluded us from shipping.

What we did do in the agreement is provide a mechanism for the removal of the Canadian licenses when our levels of subsidy become equivalent so that at least we provided the opportunity for eventual shipment or possible export of some of these grains to Canada.

Senator BOSCHWITZ. You answered my second question. In other words, we are going to now at least be afforded the opportunity in the future.

Ambassador HOLMER. That is right. That is a benefit that would not otherwise be available, were there not a free trade agreement with Canada.

Senator BOSCHWITZ. That is right.

Mr. MYERS. That would be of particular interest to oat producers, for instance, in the Eastern part of the United States who have been precluded from shipping oats into Canada who have wanted to do that.

Senator BOSCHWITZ. Right. I was not going to make that particular point, Peter, but I was going to make the other point. Will the Free-Trade Agreement allow Canada to have a passthrough operation for ethanol, for instance? I know my corngrowers are concerned about what is happening with the CBI.

Does Canada have an established ethanol industry that is likely to compete with the United States?

Ms. VENEMAN. We do not believe it will, Senator.

Senator BOSCHWITZ. There is no ethanol production, but would you answer the first question about whether or not Canada can operate a passthrough type of system? Bring in some low-grade wine or something, or have it processed elsewhere and ship it into the United States?

Ambassador HOLMER. If I could, Senator Boschwitz, I would like to have Chip Roh from our General Counsel's Office at USTR to respond to that question. Chip.

Senator BOSCHWITZ. Right.

Mr. ROH. Thank you. Senator, we do not think so. One obstacle they would face if they tried to do a passthrough with cheap imported wine, is that the wine duty is enormous in Canada. It is very expensive to bring over.

Under the agreement, the only type of alcoholic beverage they could use is that containing under 24 alcohol. It is expensive to transport. It would be expensive to dehydrate it and turn it into ethanol, and there is a very high duty on the product. So it would just not be economically feasible for them to do the kind of operations in Canada about which concern has arisen in the Caribbean. They could not use rum in Canada. They could not use higher than

24 percent alcohol wine to do this. And it does not appear to be economically feasible to use low alcohol wine.

If they did try to fool around with their duty to create a carve-out, that would be really doing an end-run on the agreement, and we would move promptly on that situation. Thank you.

Senator BOSCHWITZ. What I am driving at is that I do not think that our corngrowers have reason to fear. Is that correct?

Mr. ROH. We do not see any basis for such a fear.

Senator BOSCHWITZ. Wonder if you would talk a little bit, any one of you, about sugar? How do section 22 limitations on sugar and sugar-containing products affect our present restrictions on imports of those products?

Mr. ROH. Sir, we have no restrictions on sugar-containing products containing less than 10 percent sugar by dry weight. So there is no effect on any existing program.

In fact, that question was examined, and I believe the ITC found that there was no reason to believe that sugar containing products containing less than 10 percent sugar would pose a threat to the program.

Senator BOSCHWITZ. So the protection for products with greater than 10 percent sugar will be kept in place?

Mr. ROH. Oh, absolutely.

Senator BOSCHWITZ. Yes. That is really what I was driving at as well. I am pleased that the Wheat Growers seem to be more at ease with this agreement. That was my understanding as well. What other commodity or farm organizations have you spoken with that seem to be more at ease? Who do you find still objecting to this treaty?

Ms. VENEMAN. I will try to partially answer that question. Other people may have some input. There have been some concerns expressed by various groups. I think there were some concerns expressed by the corngrowers. They sent us a letter, and we have sent a reply back.

Most of those concerns did not—as far I know, all of those concerns were really not relevant to problems with the agreement per se, but other problems with Canada. And I should say that that really has been the case with a lot of the concerns that have been listed by a variety of agricultural interests.

That is some of the complaints about Canadian problems in general rather than complaints about specific problems with the agreement that it does or does not fix. That is the agreement does not fix some of the existing problems that are there.

There have been many concerns expressed on the part of the potato industry, for example. Again, those concerns primarily involve issues that are not relevant to things that were addressed by the agreement.

There are concerns that the agreement did not fix some of the problems that they have in the past. I think we have come up with some language in the statement of administrative action to address the concerns of the egg producers, and as well there were some issues expressed by some of the vegetable producers on the way. The snap-back would work and I think we have addressed all of those concerns as well.

So hopefully we do not have significant concern or opposition from the agricultural industries. We have worked extensively with the cattle industry. For example, on the implementing legislation on the meat import laws as well as the agreement provisions and so forth.

Ambassador HOLMER. There is also language included that addresses the concerns of the American Plywood Association as well.

The CHAIRMAN. Rudy, were you through?

Senator BOSCHWITZ. I wanted to make one final comment, not by way of question, Mr. Chairman. And that is about the wheat export index that was shown here by Senator Conrad should not be misunderstood. The chart is expressed by way of percentage, is it not, Mr. Conrad? The United States certainly exports more than the total Canadian crop, by and large, and Argentina farms a total of 60 million acres.

We have acres than that are devoted to wheat in this country, and that is their entire farm base. People should not get the impression from this chart that Argentina is exporting more wheat than we are or that Canada is, for that matter.

The CHAIRMAN. Senator Conrad.

Senator CONRAD. Would the Senator just yield on that point so I could explain?

Senator BOSCHWITZ. Sure.

Senator CONRAD. Each chart starts with a base of 100 showing the level of production or level of export of each of those countries in 1981. The charts show what has happened to each country's relative position since then.

Again, the whole purpose of showing these charts was to demonstrate the difference between our system and the Canadian system. And what we are doing in this Free-Trade Agreement is to attempt to coordinate two systems that are very different.

That is going to lead to consequences that may be unintended. That is the point of these charts, and I want to make it clear that we are concerned about the fact that the United States has a policy that is largely designed to manage supply. The Canadian system is designed to enhance export. When you put those two systems together in times of surplus, our program is going to experience a cost due to that difference. That is the point.

Senator BOSCHWITZ. I think the chart shows that they are a little smarter than we are. And that when you bring the loan rates down and become competitive, as you see, we zoom up again.

The CHAIRMAN. Mr. Myers, the most important aspect of this agreement to a lot of the people we have heard from, a lot of the farmers we have heard from, particularly our wheat growers, is the effect it is going to have on section 22 of the Agriculture Adjustment Act.

Can you tell me how the agreement affects section 22, whether it diminishes or increases our ability to protect domestic farm programs from imports? In other words, if this goes in, where is section 22?

Mr. MYERS. I will let Ann Veneman answer that, Mr. Chairman.

The CHAIRMAN. Ms. Veneman.

Senator BOSCHWITZ. Good thing they brought her along.

The CHAIRMAN. I agree with Senator Boschwitz. It is a good thing they brought you along. Go ahead.

Ms. VENEMAN. We have maintained the ability to use section 22. [Laughter.]

Can I finish the sentence?

The CHAIRMAN. I did not find anything particularly funny about that answer.

Ms. VENEMAN. So long as——

The CHAIRMAN. I suppose if you put up with the Minnesota winter, it does things to you. But go ahead, Ms. Veneman.

Ms. VENEMAN. So long as imports decrease significantly as a result of a substantial change in the price support programs of either party. And what this means is there was concern on the part of the Wheat Growers and they worked with us rather extensively with regard to how significant increase and substantial change was going to be interpreted, and I am sure you have all gotten a copy of the draft statement of administrative action which does reflect the language that has been worked out to interpret how this provision would be administered.

Now it is important to keep in mind that we do not even get to the questions of significant increase and substantial change until we have met the overall conditions of section 22. In other words, you have to have the section 22 conditions met before you even get to those other questions.

We believe that in most cases where you would have a section 22 issue where you would want to apply it, you would have those other issues probably, those other conditions, I mean, already met.

The CHAIRMAN. When did we use section 22? When is the last time we used section 22 on wheat?

Ms. VENEMAN. I think it was in 1974.

The CHAIRMAN. Now section 22 affects only the grains, right, corn, wheat, barley, oats, rye?

Ms. VENEMAN. Insofar as that agreement provision affects only the grain. Section 22, of course, we use on dairy, peanuts, cotton.

The CHAIRMAN. Sure. So you can see, though, this is going to be very important to the Wheat Growers. Now I understand based on the letters and discussion we have had before, there has been an effort to work out some kind of language that they and you would feel was keeping section 22 viable. Am I correct in all that?

Ms. VENEMAN. Yes.

Ambassador HOLMER. And if I could, Mr. Chairman, they write it is also fortunate that the administration has agreed to adopt such a favorable reading, one which in our view will largely maintain the integrity of section 22 and provide other benefits.

The CHAIRMAN. Let me ask you another question. We have heard a lot of statements, the administration and otherwise, saying if we ratify this agreement that is going to send a signal to our trading partners that the United States is serious about trade reform.

Now I heard a lot about signals, and when I was over in Geneva, the time Senator Boschwitz and I and others were there, Secretary Lyng, Ambassador Yeutter, I was not sure whether anything other than a baseball bat would give a signal to some of our trading partners.

I mean I never saw such a "you do it the way of free trade but because of our country"--and fill in the blank with the name of the country—you can fill in just about all of them—"we do need these protectionist measures. We need subsidies and everything else."

I mean the Japanese were virtually arrogant in their disregard of anything we might be doing. A lot of the other countries were blunt. Diplomatic language was not even used that they are going to do it their way, but would like to see us go ahead and just totally open up our markets.

Now I have always envisioned this as kind of a step-by-step in tandem as we open up these markets. So what is in here that we should vote for? Why should we vote for this agreement?

Mr. MYERS. Well, in essence, I agree with what you have said, Senator. But the bottom line here is if we cannot agree with our neighboring country, and we have a relatively open border for people to cross, we cannot have an open exchange of products, whatever they be, manufactured or agricultural.

We would have serious problems attempting to show the rest of the world that we really want free and open trade, and I think that is our basic concept. Maybe Alan will want to add to that.

The CHAIRMAN. You might want to tell me who the winners and the losers are in this.

Ambassador HOLMER. Well, yes. The Canadians and the United States are both winners under this agreement. In the agriculture area, let me tell you some of the positive things are that we think should be in the front of your minds when you decide whether to vote for the agreement or not.

There is a commitment by Canada not to sell products in the United States at less than the government acquisition cost plus transportation. That means, in other words, their government cannot dump from their stocks into the U.S. market.

There is a commitment not to use export subsidies on products marketed to the United States, a commitment that does not now exist. As we discussed, there is elimination on transportation subsidies to the West. There is exemption from the Canadian meat import laws, a benefit that otherwise would not be available.

There is potential elimination of the Canadian import licensing scheme, something that also would not be available. There is a phaseout of all Canadian tariffs which are considerably higher than ours, a benefit that should be of particular value to processed agricultural products.

There are, Senator Wilson, significantly enhanced access on wine and distilled beverages with comparable benefits on beer that are likely in the future because we preserved our GATT rights, and the EC has had a GATT victory in this area.

There are modest improvements in access for U.S. eggs and egg products. We preserved our earlier victory on softwood lumber, and we had this potential resolution on the plywood issue. We have full preservation of our countervailing duty laws, and a commitment to work on the bilateral subsidies issue over the next 5 to 7 years.

And we have also preserved our antidumping law and our safeguard law under section 201. That is the short list of favorable benefits.

The CHAIRMAN. What happens if they do start dumping, what kind of protections do we have? What kind of protections do our farmers have against subsidized or dumped imports?

Ambassador HOLMER. With respect to subsidized imports, we continue to retain our countervailing duty law and our antidumping law as written and as rewritten by the Congress. We also presumably if they were——

Senator DASCHLE. Mr. Chairman, would you yield on that point? I want to make sure I understand this. As rewritten, are you referring in that case to the trade bill itself?

Ambassador HOLMER. Well, this agreement does not go into effect until January 1, 1989. As I indicated to the chairman, we continue to hope that there will be a trade law in 1988. I do not want to get back into all that discussion.

Senator DASCHLE. That is a very important distinction.

Ambassador HOLMER. But assume——

The CHAIRMAN. Let us go by what we have here because I really am convinced after this veto the President has killed the chance for trade legislation this year. So I think we better deal with what we have before us on the table. In that regard, how would you answer Senator Daschle's question?

Ambassador HOLMER. OK. If there were a trade law in 1989, the Congress can change the dumping and countervailing duty laws provided that they are consistent with the agreement and do not violate the subsidies code or the dumping code, and that is certainly one of the basic concepts that the Finance Committee and the Ways and Means Committee and other Members of Congress have had in any kinds of changes that they have made to those laws.

So there is nothing that precludes Congress from making changes to our trade laws in the future.

The CHAIRMAN. Well, yes, there is. We tried that this year. Did you want to follow up on that? We have had all these kind of disputes over countervailing duty law, and we have what is called the binational panel which is now there to solve these disputes. Could we lose some of the protection afforded by countervailing duty law as a result of this panel's decisions? Is it going to make it more complicated and more expensive?

Ambassador HOLMER. Well, we do not believe so, Senator. Indeed, we think it is going to make it less complicated and less expensive. Presently, a private party if they want to appeal a decision, they go to the Court of International Trade or Court of Appeals for the Federal Circuit. That can often be a very time-consuming process.

We believe that under this new binational dispute settlement process, those decisions can be made more quickly, and perhaps most importantly, the way it works now is if it is a Canadian case brought against our exports, and there have been more Canadian cases than U.S. cases, but if it is a Canadian case, a U.S. private party presently cannot appeal the subsidies or dumping determination made by the Canadian Government. They will now have that opportunity which they do not have current law.

The CHAIRMAN. Even if they are done at the provincial level? I mean the provincial governments up there have so much power and autonomy. What if they are the ones doing it?

Ambassador HOLMER. Yes, the provincial governments do not presently have a dumping or countervailing duty law, and I would want to double-check this, Mr. Chairman, but as far as I know, they have no power whatsoever with respect to international trade.

The CHAIRMAN. Take a look at that. I may have some followup questions for the record on just the specific question of provincial governments. I yield to Senator Wilson.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman. Secretary Myers and Ambassador Holmer, let me ask this of you. Since Ambassador Holmer touched on the removal of the various barriers to access for U.S. wines in Canada, let me pursue that with you.

The national treatment, as it is termed, that would be hopefully applied to the provinces under the Free-Trade Agreement would, I agree, substantially improve access. What troubles me and what I do not see any provision made for in the draft legislation, the implementing legislation, is what happens if the provinces take it unto themselves to ignore that? Now that is not an academic consideration. To the contrary, there have already been, unhappily, very clear indications that the provinces intend to do just that, and specifically, as you are aware, Ambassador, the problems that have afflicted our access have had to do with discriminatory markups, discriminatory listings, or more accurately, failure to list American products whether it be beer, wine or liquor, as well as distributional problems.

Now let me invite your attention to some specifics having to do with the removal of the discriminatory markups. I do not think that we can rest very easily with the Free-Trade Agreement unless our implementing legislation makes it clear that in the event that the provinces do flout, as apparently they can under the Canadian Constitution, the national treatment prescribed by the Free-Trade Agreement, as Quebec and Ontario have evidently announced plans to do in their listing policies. It seems to me that we are without remedy unless we have in our own implementing legislation provided for that contingency and can withdraw corresponding advantages that would be accorded under the Free-Trade Agreement to the Canadians.

And Quebec and Ontario have announced plans to make major changes to their listing policies and practices that will make them even more discriminatory. In connection with the markups, the current discriminatory markup differentials presumably would be phased out over the next 7 years and any remaining differential would be allowed only if the Liquor Control Board could show an audited difference in the administrative cost of service or handling between U.S. and the Canadian product. But, in fact, statements have been made by the Canadian provincial officials in some provinces that indicate that it is perfectly possible, even under the Free-Trade Agreement, for them to impose what they will term an administrative fee which is equal to the most discriminatory of the markups that they now charge, and specifically the Alberta Liquor

Control Board has imposed just such a fee in the form of a flat tax on imported beer which is not covered by the FTA.

Now, again, I have not seen anything in the draft legislation, the implementing legislation, that makes provision for the contingency of provincial nose-thumbing at the national treatment that is prescribed as a good intention by the FTA but not as a requirement.

Am I not correct that they are free under the Canadian Constitution to just do as they damn please?

Ambassador HOLMER. I believe not, Senator Wilson, and let me just respond as follows. First, we greatly appreciate the leadership that you have provided in this area. We believe that this agreement is a clear winner for wine producers and distilled spirits and we think it is going to have great benefit for the United States.

Article 103 of the agreement commits the parties to ensure that the provisions of the FTA are given effect by provincial, State and local governments. And in addition, Prime Minister Mulroney has made it clear that all necessary steps will be taken to ensure that Canada is in a position to fulfill all of their obligations as of January 1, 1989, not just at the Federal level but also at the provincial and local level.

And we believe that the Canadian draft implementing legislation which we have not seen yet, but we will see later this week, we believe that will ensure that the provinces will comply. We need to review that. We would like to have a chance to do that with you directly, Senator.

I would also note that if for some reason there was Canadian provincial noncompliance, and we do not believe that is going to happen, but if that were to happen, we certainly retain our rights under section 301 of our trade laws and also could presumably take the Canadians to the dispute settlement mechanism within the agreement.

But I think we need to see the implementing legislation and have a chance to pursue that further with you, and I would hope, Senator Wilson, that that would address your concerns.

Senator CONRAD. Would the Senator yield on that point?

Senator WILSON. Surely.

Senator CONRAD. I asked a series of questions of the Library of Congress on the Canadian Constitution, and just on this point, they came back and said to me that most scholars agree that the labor convention case struck a constitutional balance that is consistent with Canadian traditions. That case precluded Parliament from encroaching upon provincial powers by entering into international agreements.

Therefore, the chance that the Federal Government would be able to justify Parliament overriding any inconsistent provincial laws on the grounds that it enjoys an as yet unrecognized treaty power appears remote.

The responses are from Stephen Clarke, senior legal specialist, the Library of Congress, on what happens when you have the provinces engaging in an activity that is not in line with the overall agreement. I would be interested to hear your response because it is very much in line with the point Senator Wilson has made.[1]

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[1] See pages 148 to 157 for the material referred to by Senator Conrad.

Ambassador HOLMER. We would be happy to, Senator. I would like for Chip Roh from our General Counsel's Office, to respond to that question.

Mr. ROH. First, Senator, my understanding is that the preponderance of Canadian constitutional opinion is to the contrary on the report you had from our Congressional Research Service. I have been in contact with my Canadian colleagues, and they said with a few exceptions, the constitutional scholars in Canada do not agree with the conclusion that they cannot enforce. The preponderance of constitutional opinion in Canada is that the Federal Government can meet its obligations under the FTA consistent with the Canadian Constitution.

And this is a view held even by those who do not like the FTA for other reasons.

Senator CONRAD. Well, here is another comment that is in this legal memo. It says,

> . . . there is no precedent for upholding a federal law that would override a valid provincial law on the ground that it pertains to trade and commerce, which now has an international dimension as the result of Canada's entering into an international agreement.

Now I do not know if Canadians are reporting that, but our legal counsel is saying there are no precedents. Now there seems to be a wide gulf here between what you are reporting the Canadian constitutional experts say and what Congressional Research Service legal experts say.

Mr. ROH. Yes, sir. But with respect, if the Canadian Library of Congress wanted to do a constitutional memo on the United States Constitution, I do not think that we would necessarily assume that that was the dispositive opinion. I think that the Canadians, in fact, have relatively little constitutional litigation in this area because they do not tend to resolve things through litigation.

But I would be very hesitant to rely on any U.S. scholars' views of what the Canadian Constitution is.

Senator CONRAD. How about the Canadian Embassy?

The CHAIRMAN. Wait a minute. I cannot accept that you would hesitate to accept what any U.S. scholar thinks of the Canadian Constitution. I mean that is pretty arrogant. That is assuming that we do not have anyone here that would know what they are doing.

We have, on the one hand, the administration coming in and making a statement like that, and 2 days later, we will be off at another committee, and the administration will say, well, we have looked at this and this is exactly what is going on. I mean we have had everybody—from Secretary Shultz on—explaining what is involved under Soviet law in the INF agreement debate here recently. And that we should feel very free to accept U.S. interpretations, legal and otherwise. Come on. I am sure you did not mean it that way, but you may want to take a look at your testimony when it comes out.

Mr. ROH. I certainly apologize. I did not mean it as an arrogant statement. I just know that we are traditionally very sensitive. I have a lot of foreign lawyers explain what U.S. law means to me, and I——

The CHAIRMAN. I understand. But we also have every time the beginning of a treaty appears, the Department of State and Secre-

taries up here explaining, based on our interpretation, what we can and cannot do.

Senator CONRAD. Mr. Chairman, if I might just pursue this matter.

Senator WILSON. This is on someone else's time.

The CHAIRMAN. It is on mine.

Senator CONRAD. In the meeting that our staffs had with the Canadian Embassy, our staffs raised the question: do you not have a problem with the labor convention case? The Canadians stated that it would require a Canadian Supreme Court decision overturning current practice. Now that was their answer.

If some are not satisfied with what our own legal minds tell us is a problem, will you accept the word of the Canadian Embassy?

The CHAIRMAN. Which really goes to the questions I am also going to be submitting for the record.

[The material follows:]

PATRICK J. LEAHY, VERMONT, CHAIRMAN
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United States Senate
COMMITTEE ON
AGRICULTURE, NUTRITION, AND FORESTRY
WASHINGTON, DC 20510-6000

May 26, 1988

The Honorable Peter C. Myers
Deputy Secretary
U.S. Department of Agriculture
Washington, D.C. 20250

Dear Mr. Secretary:

Enclosed please find the questions submitted for the record in association with the hearing held before the Senate Committee on Agriculture, Nutrition, and Forestry on May 24, 1988.

We would appreciate responses to these questions as soon as possible. Please return your responses to Betsy Paul, Hearing Clerk, Room 328A Russell Senate Office Building.

Let me take this opportunity to thank you once again for appearing before the Committee and responding to our queries regarding the United States/Canadian Free Trade Agreement.

Sincerely,

PATRICK LEAHY
Chairman

PJL/bp

Enclosure

QUESTIONS SUBMITTED BY AGRICULTURE COMMITTEE
WITH RESPECT TO THE U.S.\CANADIAN
FREE TRADE AGREEMENT

1. Provincial governments play a much stronger role in determining trade policy in canada than states do in the U.S. Is it possible for a particular province to enact laws that would circumvent the agreement?

2. In the event a province fails to honor its obligations or to provide national treatment under the FTA, what recourse does the U.S. have (a) to enforce such obligations or to require national treatment; or (b) to seek a remedy or compensation for the violation of such obligations or lack of national treatment?

3. There is an expressed negative attitude of the Provincial governments and the Provincial liquor monopolies (LCB) toward the Agreement and their willingness to abide by its guidelines. The following are examples of provincial resistance through the establishment of non-tariff trade barriers to undermine the intent of this Agreement.

   According to Agriculture Minister Wise, Canada can still control American imports of fruits and vegetables by imposing non-tariff barriers such as packaging requirements and buying orders before goods can enter the country or other provinces.

   Regarding wine, the "National Treatment" provision is to allow fair listing, mark-up, and distribution practices. However, Quebec and Ontario are already planning to make major changes to their listing policies and practices that will be even more discriminatory.

   "Administrative costs" of service or handling could be used to continue discriminatory mark-ups. Canadian Provincial officials have already stated that this "administrative fee" can be made equal to the current discriminatory mark-ups.

   Given such provincial retaliation, what steps has the Canadian Government taken to ensure provincial compliance? How do they plan to enforce the "National Treatment" provision upon opposing provinces? What is Canada doing to ensure the intent of the treaty is not undermined by its own provinces? What assurances does the U.S. have that Canada <u>can</u> fully comply with the Agreement?

4. With respect to the provisions of Article 705 that provide for market access for grain and grain products when the level of government support for wheat, oats, or barley provided for by both countries becomes equal, in which of these grains are the levels of government support equal? Are any of the other grains likely to become equal in the near future?

5. What is the likelihood that canadian wheat imports into this country could escalate as a result of this agreement?

6. Are we headed for a period of tight domestic supplies of wheat? What could this mean for our trading relationship with Canada?

USTR RESPONSES TO SENATE AGRICULTURE COMMITTEE QUESTIONS 1-3

Question 1:

Provincial governments play a much stronger role in determining trade policy in Canada than states do in the U.S. Is it possible for a particular province to enact laws that would circumvent the agreement?

Response:

Under Article 103, the Canadian federal government is obligated to ensure that provincial measures comply with the agreement. Under the Canadian Constitution, the federal government is responsible for international relations and international trade. The customary delineation between federal and provincial authorities, however, is not the same in all respects as the division of such authorities in the United States. The Government of Canada has assured us that Canada can and will meet all obligations of the Agreement, including appropriate action in Canada to ensure compliance of provincial measures. As in the United States, the options available to the Canadian federal government include persuasion, litigation, and legislation.

Question 2:

In the event a province fails to honor its obligations or to provide national treatment under the FTA, what recourse does the U.S. have (a) to enforce such obligations or to require national treatment; or (b) to seek a remedy or compensation for the violation of such obligations or lack of national treatment?

Response:

If a provincial government violates the provisions of the Agreement, including the national treatment obligations, the United States has the same recourse and the same rights as in the case of violations by the Canadian federal government. The United States could equally invoke the dispute settlement provisions of Chapter Eighteen of the Agreement for violations by federal, state, or local governments. If a provincial (or state) measure is found to violate the Agreement and the violation is not eliminated, then the other country is entitled to compensation or to retaliate.

Question 3:

There is an expressed negative attitude of the Provincial governments and the Provincial liquor monopolies (LCB) toward the Agreement and their willingness to abide by its guidelines. The following are examples of provincial resistance through the establishment of non-tariff trade barriers to undermine the intent of this Agreement.

According to Agriculture Minister Wise, Canada can still control American Imports of fruits and vegetables by imposing non-tariff barriers such as packaging requirements and buying orders before goods can enter the country or other provinces.

Regarding wine, the "National Treatment" provision is to allow fair listing, mark-up, and distribution practices. However, Quebec and Ontario are already planning to make major changes to their listing policies and practices that will be even more discriminatory.

"Administrative costs" of service or handling could be used to continue discriminatory mark-ups. Canadian Provincial officials have already stated that this "administrative fee" can be made equal to the current discriminatory mark-ups.

Given such provincial retaliation, what steps has the Canadian Government taken to ensure provincial compliance? How do they plan to enforce the "national Treatment" provision upon opposing provinces? What is Canada doing to ensure the intent of the treaty is not undermined by its own provinces? What assurance does the U.S. have that Canada can fully comply with the Agreement?

Response:

The proposed Canadian federal implementing legislation specifically authorizes the federal government to enforce compliance with the alcoholic beverage provisions of the Agreement in any province that fails to comply voluntarily through the issuance of federal regulations. It is our understanding that, as in the United States, the federal government will seek voluntary compliance by local governments and use its legislative powers or litigation only if a cooperative approach is unsuccessful. Under the Agreement, Canada is obligated to take all necessary measures to ensure compliance. If we believe a provincial measure is not in compliance with the Agreement, we can withdraw from the Agreement (or refuse to put it in force), or we can enforce our rights through dispute settlement proceedings. Lack of domestic authority is not a justification in dispute settlement proceedings for failure to comply or to ensure compliance with the Agreement.

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

October 14, 1988

Honorable Patrick Leahy
Chairman
Committee on Agriculture,
Nutrition, and Forestry
United States Senate
Washington, D.C. 20510-6000

Dear Mr. Chairman:

Enclosed are our reponses to questions presented by the Committee on Agriculture, Nutrition, and Forestry regarding the agricultural provisions of the United States-Canada Free-Trade Agreement (FTA). The Office of the United States Trade Representative will respond to those questions not pertaining directly to agriculture. We appreciate the opportunity to have appeared before the Committee and to now address your concerns with the FTA.

Sincerely,

PETER C. MYERS
Acting Secretary

Enclosure

QUESTIONS AND ANSWERS - FREE TRADE AGREEMENT
Senator Leahy - Senate Committee on Agriculture, Nutrition, and Forestry
Responses to questions of May 26

4. Question

With respect to the provisions of Article 705 that provide for market access for grain and grain products when the level of government support for wheat, oats, or barley provided for by both countries becomes equal, in which of these grains are the levels of government support equal? Are any of the other grains likely to become equal in the near future?

Response

Canada has agreed to eliminate import licenses for U.S. wheat, barley, oats and their products when U.S. Government support for the particular grain is equal to or less than that of Canada. Each country will calculate its own support level in accordance with a methodology set forth in the FTA. There is a mechanism to resolve any disagreement over the other country's calculation. Based on preliminary estimates, Canadian import licenses for oats would probably be subject to removal when and if the FTA is implemented. These estimates also indicate that U.S. subsidies on barley and wheat are greater than those of Canada at this time.

Given the intricacies of the world grain market, compounded by the uncertainty of future government policy with respect to support by both countries, it is impossible to accurately predict when the U.S. and Canadian levels of government support for wheat and barley will become equal. However, the possibility of removing Canadian import licenses now exists, where it did not prior to the Agreement.

As you know, our proposal in the Uruguay Round calls for the removal of all agricultural trade distorting subsidies on a global basis within ten years. Progress in this forum could also assist in opening the Canadian market to U.S. grain.

QUESTIONS AND ANSWERS - FREE TRADE AGREEMENT
Senator Leahy - Senate Committee on Agriculture, Nutrition, and Forestry
Response to questions of May 26

5. Question

What is the likelihood that Canadian wheat imports into this country could escalate as a result of this agreement?

Response

The Department of Agriculture feels that it is highly unlikely that U.S. imports of Canadian wheat will increase as a result of this agreement. At times during recent years, periodic decreases in U.S. production have created conditions in which Canadian wheat might very profitably have been sold into the U.S. at some border locations; however, the Canadian selling authorities have followed the view that their best and most profitable course for the long-term is to market their wheat overseas and forego the occasional short-term opportunity to increase border sales to the United States. The same condition is expected to prevail in the future and is unlikely to be changed by the Free Trade Agreement. The U.S. wheat crop is projected to increase in 1989/90, particularly for durum wheat; this should result in a decline in imports of wheat from Canada. Furthermore, the current U.S. tariff on wheat, 21 cents per bushel, is relatively low. Since under the terms of the FTA this tariff will be phased out over 10 years, the annual change will be minuscule and its effect on imports of Canadian wheat will be minor.

QUESTIONS AND ANSWERS - FREE TRADE AGREEMENT
Senator Leahy - Senate Committee on Agriculture, Nutrition, and Forestry
Responses to questions of May 26

6. Question

Are we headed for a period of tight domestic supplies of wheat? What could this mean for our trading relationship with Canada?

Response

Both the U.S. and Canada are expecting somewhat less plentiful wheat supplies in 1988/89. However, with the relaxation of the acreage reduction requirement for the 1989 crop, U.S. wheat production should increase. Tighter wheat supplies in Canada in 1988/89 could lessen pressures to sell wheat to the United States as the Canadian Wheat Board emphasizes sales to more traditional customers.

Ambassador HOLMER. Well, I guess I would like to have a chance to review that opinion from the Library of Congress. I would like to have a chance to talk to whoever from the Canadian Embassy.

The CHAIRMAN. That is fair.

Ambassador HOLMER. I would summarize, though, Mr. Chairman, by saying the Canadians have undertaken an international obligation. The Prime Minister of the Government of Canada has said that all necessary steps will be taken by January 1, 1989, to ensure that the federal, provincial and local governments fully implement this agreement.

We take him at his word. If for some reason it turns out that that does not happen, the United States is certainly fully prepared to take action to protect U.S. rights.

The CHAIRMAN. Well, we have to go back to Senator Wilson. I have discussed this with Prime Minister Mulroney, and I have a great deal of respect for him. I think that on a couple of these legal questions that have been raised by me, by Senator Conrad and others, I would urge you to work as quickly as possible in getting those answers.

Senator DASCHLE. Mr. Chairman, not on Senator Wilson's time, but just another point that falls outside of the 37 decision is a requirement of the Senate Finance Committee that we passed that said that the President would have to certify that Canada is able to assure compliance of all 10 Provinces before the agreement can take effect. That is in the accompanying language that was passed in the Finance Committee.

Just coincidental to that, on May 18 Ontario's Premier David Peterson told reporters that the free trade pact was dead if it required Ontario's approval. So there is some real concern with regard to compliance there that we are going to have to address with or without adherence to the 37 decision.

The CHAIRMAN. Back on Senator Wilson's real time.

Senator WILSON. Mr. Chairman, I am pleased with the intervention because it makes the point that I was trying to make, and for the obvious reason that as much as we commend Prime Minister Mulroney, and I do commend him for extraordinary leadership, and I have absolute faith in the good faith with which he has treated the entire negotiation, but the comment that Senator Daschle just made quoting the Ontario Premier, Mr. Peterson, makes it clear that he does not share our admiration, at least to that performance by Mr. Mulroney, and is prepared to fight it every step of the way.

So I think we have to be absolutely certain of what our legal ground is. Otherwise, these good intentions are going to mean very little except a lot of conflict, and we may increase the role of litigation between the countries.

Another point in this same area has to do with the treatment that the Canadian Government intends to give European wines as a result of the GATT panel report that was adopted by GATT this week.

That report, as I am sure you are aware, found that the Liquor Control Board practices were a violation of Canada's international trade obligations. And that is encouraging, but again, the question is what is the legal effect from the standpoint of the Canadians?

So, again, I would say that when we are looking at these assurances and proposing to protect ourselves by way of implementing legislation, one of the things that has to be included in that consideration is the contingency that either the Canadian Government or some of the Provinces would give preferential treatment to the European wines, give concessions that they are not affording to U.S. spirits coming into Canada.

And one of the things that I find most disturbing, incidentally, in this whole thing, and I wish that you would look specifically at this in gaining a legal opinion, and that has to do with what happens when the device is used that alcoholic beverages from the United States are admitted to Canada but then encounter the greatest difficulty in moving intraprovincially?

I mean it is the same thing as though they came into Montana destined for the market in Los Angeles only to find that when they sought to enter across the California line, suddenly they were confronted with an entirely new set of regulations and standards. That threat has also been raised explicitly by Canadian officials, by Provincial officials.

Let me just ask you this, Ambassador Holmer. You mentioned, I think, a moment ago, that you expected to have responses of this kind available in a week?

Ambassador HOLMER. You mean responses to the questions that are being put to us by members of the committee? I would hope it would be in substantially less than a week. We are on a June 1 timetable, and are attempting to be in a posture where the President could submit implementing legislation on June 1 or very shortly thereafter.

We want to have a chance to work through the implementing legislation with the members of the committee, but if there are questions that are outstanding, we want to get you responses in writing just as soon as we possibly can.

Senator WILSON. I will look forward to working with you. I am more than happy to accept your invitation. That business of its getting into the country and then being stalled as it seeks to move laterally in the Provinces is of obvious importance.

Ambassador HOLMER. Right.

Senator WILSON. Thank you.

Senator CONRAD. I want to go back to the question of section 22 because I think when you boil out all the rest of it, the most critical question we have really attaches to what happens to section 22.

There has been a reference to the letter from the National Wheat Growers Association, and I would just like to take a moment to review several of the paragraphs in that letter which point out the critical importance of section 22.

In the May 24 letter, the Wheat Growers point out from a 1986 report on "Trade Policies and Market Opportunities for U.S. Farm Exports," that the U.S. Department of Agriculture said: "By virtue of the monopoly power over wheat exports entrusted to the Board by the Government, the Board is in a unique position to adopt lower than posted price levels on its sales to certain key markets when it wishes either to initiate new business or expand its market share. That is to say, the posted price may or may not be the selling point."

"In addition," the letter points out, "Canadian wheat shipped to the United States through Thunder Bay benefits from a transportation subsidy—the so-called 'Crow's Nest' rail rates—that at recent exchange rates amounts on average to about 50 cents per bushel. Other nonmarket factors are potentially at work, too: Notably, the market-based pricing system in the United States pays premiums for higher protein content in some classes of wheat, while the governmentally administered pricing systems in Canada does not reward protein content to the same degree. Hence, farmers in Canada living near the U.S. border might have an incentive to sell into this country rather than at home, simply because their government was failing to pay the premiums dictated by market forces. At present the Canadian Wheat Board does not grant export permits to individual Canadian farmers, but nothing in the FTA requires this discipline to continue."

The letter from the Wheat Growers goes on to say: "It has seemed to us that, given the factors described above, it is appropriate for the U.S. to retain some legal recourse—a political counterweight—in case it was needed. The most effective counterweight in the recent past appears to have been Section 22 of the Agricultural Adjustment Act of 1933, even though it has not actually been used to put on quotas on wheat imports since 1974."

That whole preamble sets up the case for why maintaining section 22 is important to us.

Now we know that section 22 has had an additional hurdle put in its way, and that is the language in the the agreement which creates a new condition for invoking section 22. Import quotas (section 22) could be used only, "if [grain] imports *increase significantly as a result of a substantial change* in either Party's support programs for that grain." (Emphasis added.)

For the record, let us run through how the administration would read that language, because frankly that language is deeply troubling to many of us. "If grain imports increase significantly as a result of a substantial change in either Party's support programs." Ambassador, if you or the Deputy Secretary could take us through how you would interpret that language?

I think it is important to enter that into the record and then I want to ask a followup question on it.

Mr. MYERS. We would ask Dan Brinza to address that, Mr. Chairman.

Ambassador HOLMER. This is Dan Brinza from Agriculture's General Counsel's Office who basically drafted the language with the Wheat Growers and interested congressional parties.

Mr. BRINZA. Thank you, Mr. Chairman. The language that you have read there, you will see in the statement of administrative action that was submitted in draft to the committee along with a number of provisions interpreting that particular language.

As Ms. Veneman mentioned earlier, it is important to recognize that at the forefront you begin by looking at the tests in section 22 themselves. So you begin the inquiry as to the significant increase in imports as a result of a substantial change in the support programs only after you have decided that imports from Canada or in general are causing or are threatening to cause material injury to a price support program/stabilization program of the Department.

Once you have reached that decision, then the President will make the inquiry as to whether in the case of Canada, imports have increased significantly as a result of a substantial change in the grain support programs of either Canada or the United States.

As we went through with the Wheat Growers, and as you see reflected in the language that was in that draft statement of administrative action, we went through each of those terms with them to give some guidance as to how they would be interpreted.

In terms of the question of what is a substantial change in a support program, we made it clear that you would not determine that a change that has a material market impact is an insubstantial change simply because the change is a relatively minor change in policy.

By that, we mean——

Senator CONRAD. OK. Let us go through this very slowly because I want to make sure that it is very clear on the record how the administration asserts it is going to view this language.

Mr. BRINZA. Yes, sir. The reference to minor change in policy is there to make it clear that when we are talking about a substantial change in a program, it does not mean that the United States, or Canada for that matter, has to totally change its approach to support.

In other words, in the case of the United States, we currently have nonrecourse loans, target prices, deficiency payments, a number of components that make up the support for a particular grain. You do not have to totally discard that approach and adopt a new approach in order to have a substantial change in a program.

A substantial change in program could be something dealing with a change in the particular elements of the current program. For example, with the loan rates or the target price level or the way in which deficiency payments are made, or whatever.

We give a couple of examples in the draft statement of administration action saying that under the right conditions either of the two following examples could be considered to be a substantial change.

The first was the case where the Canadian Wheat Board changes its policy regarding the issuing of export permits. Currently exporting by persons subject to the Wheat Board have to receive a permit in order to make an export.

Those are not currently granted in our understanding to private farmers.

Senator CONRAD. That is correct.

Mr. BRINZA. So one of the things we said was that under the right conditions you could determine that the granting by the Wheat Board of export permits to private farmers on a free basis regardless of the market conditions could be considered to be substantial change.

Similarly, the second example given is that where under the right conditions where the United States has announced a particular change in its price support level, in this case, nonrecourse loan level, a reduction of 5 percent, and instead the reduction is 3 percent, that in itself could also be a substantial change in the price support program of the United States in that particular case.

Senator CONRAD. All right. That would relate to that part of the language. How about the rest of it in terms of interpretation?

Senator DASCHLE. Before you get off that, though, what happens if the panel, the international panel, disagrees?

Mr. BRINZA. I should have prefaced this by saying that this is all the United States' interpretation of these provisions that we would be making in terms once we, as we said, concluded the section 22 inquiry, and then moved on to the analysis as to whether imports increased significantly as a substantial result, result of a substantial change.

All of that, of course, is the United States. That would be subject to dispute settlement. If Canada disagreed with any of these interpretations, they could take us before the dispute settlement procedure in the agreement, and there, of course, the panel may adopt a different interpretation.

We feel fairly confident that the agreement—obviously we feel quite confident the agreement supports our interpretation. There is a chance, of course, that the panel might disagree with that in which case we would have to go to—or Canada might disagree, and we go to dispute settlement.

We feel, of course, that the panel would adopt our interpretation.

Senator DASCHLE. So if I could clarify again, then, what you are saying is the President determines whether there is a substantial change, and that is fairly nebulous, but you think we can quantify the term "substantial."

We then invoke section 22. Canada could disagree, petition the panel. The panel then arbitrates or makes the decision, and we then must abide by the decision of the panel with regard to invoking section 22? Is that your understanding of the procedure?

Mr. BRINZA. What happens when—and I can defer also to USTR in this, but what happens if—I would turn it around by the way. The President would invoke section 22 first. You have decided that section 22 conditions are met. Then you do the inquiry here that we are talking about in terms of Canada.

If the President then decided not to exempt Canadian products because he determined that there was a substantial change in the support program that resulted in a significant increase in imports, then Canada, of course, could initiate the dispute settlement if they disagreed with that.

As a result of the dispute settlement procedure, you might have a finding that the United States did not, in fact, comply with the agreement, that the interpretation was incorrect. In that case, it does not automatically void the section 22 restrictions.

You have a hierarchy when you get to the dispute settlement as to the results. In the first instance, of course, everybody would prefer that when you are inconsistent with the agreement that you would remove the offending practice.

However, that is not required under the agreement. The second step would be compensation to the other country in that case, and only if you failed to make compensation then does the other country have the authority to retaliate by withdrawing equivalent consessions?

Senator CONRAD. Yes, that does represent very significant weakening of section 22 in my eyes. Let me go back over this. As I un-

derstand the answer that you have just given, the Canadians have not agreed to this reading of the language; is that correct?

Mr. BRINZA. That is correct. We have not submitted it.

Senator CONRAD. This is only our interpretation of what that language means. Frankly to me—I am not a lawyer—but it seems to me it would be pretty tortured reading of the language. If the Canadians or the binational panel rejects that reading of the language, then will you repeat where we stand with respect to a section 22 action?

Mr. BRINZA. The finding that our interpretation is inconsistent with the agreement does not automatically under U.S. law revoke the section 22 action. What would happen, as we said, there is a hierarchy of what happens in dispute settlement. If we decide not to withdraw the section 22 action against Canadian imports—I should stress that section 22 is something we do globally.

Senator CONRAD. Right.

Mr. BRINZA. You look at all imports. Since we are only talking about the case we have done, section 22, on wheat, for example, and we have not exempted Canada from that.

Senator CONRAD. Right.

Mr. BRINZA. If the finding is that we have misinterpreted this particular provision of the agreement, again it does not require the withdrawal of the section 22 action. Instead, it would then trigger the next level in the hierarchy I referred to earlier which is compensation by the United States to Canada of an equivalent amount.

And if the United States fails to make compensation to Canada in that case, then Canada would be free to withdraw an equivalent level of concessions.

Senator CONRAD. I must say then this interpretation would make me even more uncomfortable. I must say this is much different than the way it was presented to me.

In other words, if I can rephrase what you are stating, if Canada does not agree to our interpretation of the language of the agreement, and again I must say it is fairly tortured reading of it, when we go before the binational panel after we have invoked section 22, the Canadians would be able to insist upon compensation from us or be able to retaliate and that retaliation could take the form of going against us in some other area; is that correct?

Mr. BRINZA. That is correct.

Ambassador HOLMER. That is all correct, Senator, although I would respectfully disagree with your characterization of this language as being tortured. We certainly do not regard it as being tortured. We believe this language is totally, completely consistent with the words and the letters in the agreement, and that is why I am sure the National Association of Wheat Growers would also believe that it is not tortured. And that is why they were willing to work out language with us that would address the concerns that they had in this area. But we would not consider this language to be tortured.

Senator CONRAD. Well, let us go over it again. The formal language says, "if imports increase significantly as a result of a substantial change in either party's support programs." Now let us talk about "as a result of."

Mr. BRINZA. All right. The "as a result of" requires a causality test, a connection, a causal connection between the substantial change in support program of either party and the significant increase in imports.

As you will see from here, we have said that the language "result of" does not mean that the change in the support program was the sole cause or was the single most important cause of change in imports. It still has to be a cause.

Senator CONRAD. All right. Now frankly that is a really tortured reading of it in my judgment. How can you interpret "as a result of" which is the language in this part of the agreement, and it says "imports increase significantly as a result of a substantial change" as meaning as a result of a change along with many other factors potentially? That is the way you would read this?

Mr. BRINZA. Yes. But I should point out, Senator——

Senator CONRAD. That is not what it says, though.

Mr. BRINZA. No, no. I should point out that it does not change the fact that we are still saying it has to be a result of. What we are simply saying is that in the market context that we are dealing with in agricultural goods, and I am sure you are much more familiar with this than I am, there are always going to be a number of different factors happening at any given point in time.

Senator CONRAD. Absolutely.

Mr. BRINZA. There are changes in the exchange rate. There are changes in production and changes in demand, and changes in competitor's production and demand.

And therefore, it is impossible, we think, to ever isolate a single cause when you are dealing with changes in trade flows. In this case, what we are saying is that it still has to have a causal connection with the substantial change in the program. That is clear and that is required by the agreement.

Senator CONRAD. Let me go back to this to tell you why I see this as tortured reading. It says, "imports increase significantly as a result of a significant or a substantial change in either party's support programs."

Now when I read the English language, that tells me the increase is a result of the substantial change. I mean that is the common understanding of that phrase. When I look at the agreement you have worked out here, all of a sudden words that have a common understanding and a commonplace meaning all of a sudden do not mean what we would normally think they mean at all.

Mr. BRINZA. I think what we are discussing here is actually the outer parameters of the question of causality. Here we are not saying that it would not be a result of. Simply the question that comes up is when we are dealing with a complicated market situation as we were describing earlier, do you have to be able to say that nothing else changed in the marketplace, or you only had the change in support program in order to make the case that this is a result of?

Senator CONRAD. All right. Let me ask you this question another way. In reality, how I read it or how you read it, frankly, does not mean a whole lot. What matters, if we get into this kind of dispute, is how the Canadians read it.

Have we made any attempt to get the reaction of the Canadians to this language? Have we been able to get them to agree to read the language the way we say we will read it? As I understand it, that is the only protection for us ultimately in keeping section 22 intact, given what happens if they do not agree.

Ambassador HOLMER. Well, frankly, Senator, we have been a little reluctant to do that.

Senator CONRAD. I understand why.

Ambassador HOLMER. Well, no, let me explain why.

Senator CONRAD. Yes.

Ambassador HOLMER. We have language that we worked out before the Senate Finance Committee on which Senator Daschle serves and the Ways and Means Committee and other committees involving eggs and autos and plywood and rules of origin and steel and wheat and fish and subsidies and ethyl alcohol and zinc alloy and a bunch of others.

And we do not want to be in a position where we go hat in hand in the Canadian Embassy each day and see, well, is this language OK with you all; is this language OK with you? I am quite confident that virtually all of these they would have said, well, no, we would prefer not to have that in the implementing legislation or the statement of administrative action.

So we have not attempted to clear with them language in this area or in another area.

Senator CONRAD. Well, Ambassador, I can understand your reason for not doing it. But you have to understand that I have a responsibility to the people I represent when we are entering into an agreement that could have a substantial impact on their economic futures that we have not signed off on something that does not have a whole lot of weight to it.

I must tell you when I see the interpretation that we have of this language, I am concerned. I understand that if there is a dispute, we go before a binational panel on which Canadians sit, and if the Canadians do not accept our interpretation, then the section 22 action is going to have been compensated for by the United States or we are going to be subjected to Canadian retaliation in potentially another area.

For example, they could retaliate in automobiles. I tell you I know the politics of this Congress, and I know the politics of any White House. If it is automobiles against wheat, we are going to lose. And I tell you that gives me grave concern, as I outlined in the preamble to why section 22 is important.

So I hope you understand that I am trying to nail down to the best degree we can what our vulnerability is. I see this, for my people, as a serious vulnerability.

Let me stop there for a moment because I have gone much beyond my time, and allow the Senator from South Dakota to ask questions that he might have.

Senator DASCHLE. Well, thanks, Kent. This has been very helpful to me as well. And it is one of the areas I would have pursued had you not chosen to. Alan, let me just go back to countervailing duties again.

You were saying in one of your earlier statements that one of the accomplishments for which you feel the most confident about

the agreement is the fact that we preserve completely current law with regard to both antidumping and countervailing duties.

But then you said in another statement nothing precludes us from changing the countervailing duty laws. Well, what is so good about preserving what we have if there is nothing that precludes us from changing in the future? What is the accomplishment, in other words, if we—it sounds to me like you are saying we have had our cake and we can eat it, too.

We have preserved it. But now you are saying that we can go back in and change it any time we want to. Explain what I view as a dichotomy.

Ambassador HOLMER. Well, periodically Congress decides that it wants to make refinements to the dumping and countervailing duty law for any number of reasons. And the only——

Senator DASCHLE. But how is it protected? I thought you just said on the one hand that it is protected, and that we have got that locked in. On the other hand, you said but we can change any time we want to. What kind of protection is that?

Ambassador HOLMER. Well, let us separate those two out. The first is there was a lot of concern in the Congress that as a part of these negotiations we were going to somehow rewrite the dumping and countervailing duty laws or provide an exemption for the Canadians.

We said to the Canadians no way. That just was not in the cards. That if we did that, the Senate Finance Committee would hang us by our thumbs. And as a result, we retained our ability to use our dumping and countervailing duty laws as written by the Congress in their current form.

We also assumed that the Congress was going to be quite negative in its reaction if we were going to foreclose your ability to be able to change those laws in the future. And therefore, we have retained the ability of Congress to change the dumping and countervailing duty laws in the future.

Now changes must be consistent with the agreement and consistent with the subsidies code and dumping code.

Senator DASCHLE. That is my next question. What happens if Senator Leahy's pessimistic prediction is right, and I sense that he probably is right, that we will not get a trade bill this year.

It is now 1989. We include the language in the current trade bill in particular with regard to the calculation on certain prices to agricultural products, point number one. And point number two, the definition of domestic industries.

On those two provisions, currently in the law, do you anticipate that you, if you were here next year, could come before the committee and confidently say that these are not in conflict with the spirit of the Free-Trade Agreement and could thereby be passed?

Ambassador HOLMER. Yes. I want to go back and take a very careful look at them in the context of the agreement.

Senator DASCHLE. That sounds like a hedge. Is it yes?

Ambassador HOLMER. Well, I have not looked at those provisions in some time, Senator, but my recollection is that there is nothing in those provisions that would be inconsistent with United States-Canada Free-Trade Agreement or the subsidies code or the dumping code.

Senator DASCHLE. What about the PSE? Do you feel that the Free-Trade Agreement allows us to review the PSE, the producer subsidy equivalent, and alter it for any purpose in the future, or are we bound to the way the PSE is now calculated?

Ambassador HOLMER. I would have Ann Veneman respond to that.

Ms. VENEMAN. Do you mean in terms of the way it is written in the agreement that we would be unable to change it for purposes of calculation?

Senator DASCHLE. That is right. There are a lot of us who feel that the PSE as it is currently calculated is not calculated accurately, number one, and calculated certainly to the advantage of Canada.

If we were to come back next year, and the Free-Trade Agreement is now enacted, can we revise the PSE?

Ms. VENEMAN. The calculation will be made each year under the guidelines and the formula that has been set forth in the agreement.

Senator DASCHLE. Well, that is my problem. Can we change the formula?

Ms. VENEMAN. Probably not, no. I do not know.

Senator DASCHLE. Locked in. We are locked in, you are saying, to the——

Ms. VENEMAN. Well, let me just say a few things about the formula. First of all, it was worked out by technical people on both sides, based upon the formula established by OECD for PSE's. However, it was tailored to take into account the specifics of the practices of both parties.

Senator CONRAD. Would the Senator yield on that point?

Senator DASCHLE. Certainly.

Senator CONRAD. I would like to follow up on the point that she is making. Let me give an example of what troubles us. Our set-asides are now included in the calculation of the PSE. All right? But it is done based on world market price. All right? We do not think that is a fair comparison.

We are not selling all of our production at world market prices. A big chunk of it has target price protection. So when we make a calculation that is at world market price, that understates the effect of our set-aside.

So while we commend the change that has been made to include in the PSE calculation our set-asides, we have a problem with using world market prices when, in fact, that is not the economic implication for us.

Ms. VENEMAN. I think we will have Dan Brinza comment on that. He participated in the negotiations on the PSE provisions of the agreement.

Mr. BRINZA. Senator, as was mentioned earlier, I am from the General Counsel's Office so I do not pretend to have economic expertise here. But let me try and shed a little light on the particular approach that was taken in this annex on the calculation of support levels.

In the particular case that you are referring to in the set-aside, the question was, what is the income that is being foregone by those particular producers? It was felt that if you took the target

price level as being the increment that was foregone, then that was double-counting, in essence, what was happening here. The support that would be provided is you would be saying they would be foregoing the target price payment on there, but they are not getting the target price payment on there. So you would be subtracting out more than they could possibly be receiving.

And so that would be a distortion to the particular calculation.

Senator CONRAD. There is no question. It is somewhere in the middle, but it is not world price either. World price is not revenue foregone.

Mr. BRINZA. It was felt that without giving them support for that, if they grew it, and did not receive support on that acreage which is what—since they are not calculating support for that acreage, it was not counted in there as support. Then the only thing you could subtract out was the actual income that they would receive if they sold it without benefit of a support program, and the levels that they would receive would theoretically be the world price.

Senator CONRAD. Well, that is a place where we would have a difference.

Senator DASCHLE. Well, I think so, and that is the whole point. That is a substantial difference in interpretation between what most farmers or what most farm organizations feel. I think you could almost say the same about what most agricultural experts would say on how one calculates an accurate PSE, and the way it was calculated in that regard.

And it clearly benefits the Canadian system. And so I am wondering—I guess you have answered my question—it puts us at a distinct disadvantage. You could take an objective analysis or a query of 50 of agricultural experts and say, all right, here is the calculation as it is interpreted now by the PSE's. Here is the calculation that you normally use. Which is fairer to the United States and to Canada? Without question, I think you would get an unequivocal response that the PSE as it is calculated in this agreement clearly benefits the Canadians, and we have to take a look at it in the future.

If we cannot do that, we are going to be in big trouble with regard to future questions and how the subsidy is going to be interpreted as we go into these other negotiations.

Senator CONRAD. If the Senator would yield for just one other comment. Let me just explain why our people think the calculation of PSE's is not fair. There is no notice taken for the positive benefit on Canadian prices and world supplies of our program. The charts that I have demonstrate how the United States took a big hit on our production levels, and a big hit on exports in order to strengthen the world price situation.

Nowhere in the calculation of PSE's is that effect taken into account—the benefit on Canadian prices and the benefit on world supplies—of the actions that we have taken. So that is the kind of thing that gives our people heartburn.

Senator Daschle, I am sorry to have intruded on your time.

Senator DASCHLE. You should be. No, I think that fully fleshes out my concern with regard to PSE's and——

Mr. BRINZA. Senator, if I could just clarify one thing for you. You had the question about the future in terms of that annex. I just want to point out that it was done as a snapshot of the particular programs in place, and the calculation for those programs as of the date it was done October 4, 1987. It is subject to change in the future, but only changes to reflect modifications in programs, new programs, availability of new sets of data.

Senator DASCHLE. Yes. The formula does not change. Obviously, the calculation would change every year as it applies to the formula. But the formula, as you say, is locked in.

Mr. BRINZA. The formula itself can change to reflect the introduction of new programs or the dropping of old programs, or changes in programs. So you can change the formula in that sense as well as the actual data that is used in the calculation.

Senator DASCHLE. Let us assume. I do not think this will happen, but let us assume we go to a marketing loan for wheat in 1989. If we did that, adopted that as farm policy for the next farm bill, you are saying that we could recalculate the formula to take that into effect?

Mr. BRINZA. The formula may need to be modified to determine how to take account of the marketing loan program. That is correct.

Senator DASCHLE. You would not come before us and say, look, the Canada Free-Trade Agreement would not allow us a marketing loan and use that as argument against implementation of a new agricultural program?

Mr. BRINZA. There is absolutely nothing in that annex that locks in current support programs. That annex is simply how you calculate support derived from them, but there is nothing that——

Senator DASCHLE. Let me ask it this way, then. Can you envision any situation wherein somebody in the next administration would come before the committee as we are contemplating the next farm bill and say implementation of this would be contrary to the Canada Free-Trade Agreement?

Mr. BRINZA. The only way that that could happen, Senator, is if it were contrary to something else in the agreement such as saying the way we are going to do our farm programs is we are going to stop all exports to Canada of agricultural goods forever. Then you might run afoul.

Senator DASCHLE. But as far as the PSE——

Mr. BRINZA. No, Senator.

Senator DASCHLE. Over section 22?

Mr. BRINZA. I am not sure how that would.

Senator DASCHLE. Well, I am thinking in terms of if under section 22 or the PSE we had some imaginative way to deal more effectively than the current law allows us to deal, you are saying that is a negotiable item with the Canadians; is that correct?

Mr. BRINZA. The terms of how to take account of changes in support programming and calculating the level of support is negotiable with the Canadians. That is true. And whether we can change our programs or not, that is not even a question of negotiating with the Canadians. We clearly retain the right to change our——

Senator DASCHLE. Unilaterally?

Mr. BRINZA. Yes. Unilaterally change our domestic support programs.

Senator DASCHLE. Thanks, Kent.

Senator CONRAD. Let me just follow up with a couple of other points on section 22. Could you tell me what this section 22 application would be in case of a dramatic change in United States-Canadian exchange rates? In other words, if there were a dramatic change in United States-Canadian exchange rates which led them to imports of a substantial amount of wheat into the U.S. market, would that be a cause for section 22 action?

Mr. BRINZA. Senator, if you are saying that only if that the only change that happened in the marketplace was a change in the exchange rates between the United States and Canada and there was no change in either party's support programs, then that would——

Senator CONRAD. Or not a substantial change under the reading of this agreement which is the only situation I have ever seen where "substantial" does not mean substantial at all. But go ahead.

Mr. BRINZA. As we said earlier, we think it is quite clearly consistent with the agreement. But in the case the language of the agreement refers only to substantial changes in support programs. So a change in exchange rate would not be a change in support program.

Senator CONRAD. How about a case in which worldwide surpluses reduced Canadian export markets, and the result was pushing more grain into the United States? In other words, no change in policy by their country, but market conditions led to significant increase of Canadian grain into this market? Would a section 22 action hold in that situation?

Mr. BRINZA. Well, of course, any exports by the Board in that case would have to be at or above their cost for those particular goods. So they could not sell it to the United States at below their acquisition plus other costs incurred for that wheat. Under the current system, we understand that that would be rather difficult to do.

Senator CONRAD. All right. Let me raise two other matters. Then we are going to have to turn to the next panel. I tell you I have enough questions to last us for 2 or 3 days. Maybe we could start back at 8 o'clock tonight and just go through until we get them all answered.

Ambassador HOLMER. There you go.

Senator CONRAD. There are two items that I raised in my opening statement that I would like to discuss with you briefly. One is the monitoring of the Wheat Board's U.S. sales. We are interested in creating a level playing field and providing for verification of the Free-Trade Agreement.

As you know, we have in our sights a concern about how closely we are actually monitoring the Canadian Wheat Board's U.S. sales. We would like to see language in the statement of administrative action which would, one, commit the Customs Service to collect and compile information on sales in the USA, and periodically review and report the results of monitoring Canadian sales of classes of Durum wheat, Spring wheat, Soft and Hard Winter wheats, other wheats, malting and malted barley, oats, and other products into

the United States And two, we would like to see language that clearly states that the United States considers private marketing monopolies established under Canadian law to fall under the auspices of article 701, paragraph 3.

What would the reaction be of the administration to those proposals? You know the concern that we have in terms of being able to know what is happening. Our sales are transparent, and theirs are veiled. What we are very concerned about is, obviously, having some greater hold on what is actually occurring.

Mr. MYERS. Well, conceptually we would agree with you. We would have to look at the details of how it would work, Senator, but if Commerce can collect it, we can surely analyze and report to you.

Senator CONRAD. All right. So this is something that we could potentially work out in terms of monitoring Canadian Wheat Board sales. In principle, we have agreement.

Mr. MYERS. We agree. Let us work with your staff and see how it needs.

Senator CONRAD. All right.

Mr. MYERS. I share your same concerns.

Senator CONRAD. Let me raise one other concern, and then we will turn to the next panel, and we will thank you for your testimony and for being here to answer these questions. Article 705 specifies that after the level of government support for wheat, oats or barley becomes equal to or less than the level of government support for that grain in Canada, Canada will eliminate any import permit requirements on that product.

However, the agreement reserves for Canada the right to demand that U.S. grain meet one of three requirements before it can enter Canada.

It must be, one, accompanied by an end-use certificate; two, denatured if for feed use; three, accompanied by a certificate issued by Agriculture Canada if for seed use. Some obvious problems flow from that. The United States would not be permitted under the agreement to require any of the three.

In other words, we see an absence of parallel treatment. Grain growers in the United States, particularly those that I represent who live near the United States-Canadian border, believe this system gives Canada some advantage, and an unjust one at that.

Is it possible to amend the agreement to get this inequity addressed to clearly define the U.S. interpretation of article 705 and to commit the administration to pursue consultations with Canada, the goal of which would be to prevent these provisions from being used as barriers to trade?

We have over and over in a world agriculture market encountered situations in which provision of an end-use certificate is used as a nontariff barrier. You know that. We know that. You have experienced it.

What would be your reaction on that issue?

Ms. VENEMAN. Senator, as I understand it, there has been some proposed language from the Ways and Means Committee markup on that very issue. I would suggest that we have a look at that language along with what you are proposing, and see whether or not that language already addresses the concern that you have.

But it is an issue that we have been working with, and I think that probably we have come a long way toward addressing that concern.

Senator CONRAD. All right. Both our wheat and barley people are very concerned about those particular provisions. Let me just say that we are going to have to end the questioning of this panel and go to the next panel. I want to thank you all very much for being here. Thank you for your patience and for your willingness to engage in this dialog. It is very important to us. Ambassador.

Ambassador HOLMER. If I could, Senator, I just want to reiterate. We want to be able to work out the implementing legislation and the statement of administrative action with you and the members of the committee.

This process, as you know, is one that basically turns the legislative process on its head where we work it out in advance and then we submit it on or about June 1, and you have to vote up or down on that agreement.

What we want to avoid is the situation where you send us draft proposals, and we pick some and reject others. We would like to be able to work everything else, and whatever legislation the Congress sends to the President in an ideal world we would like the President to be able to send back precisely that same kind of implementing legislation provided obviously it is consistent with the agreement and its implementation.

It may be in the final analysis you will still have to vote against the agreement, but our hope is that through this process, to the greatest extent possible, we can address the concerns that you and other members of the committee have.

Senator CONRAD. Let me just tell you you do not know how fortunate you are, because I have thought about starting to discuss my reservations about the Free-Trade Agreement in the context of the INF Treaty. That could have led to a very interesting and lengthy discussion of these issues.

We could have gone on for weeks.

Ambassador HOLMER. We are grateful, Senator.

Senator CONRAD. All right. Thank you very much for the time that you have taken here today. Next we are going to hear from Kristen Allen, agricultural economist, the National Center for Food and Agricultural Policy, Resources for the Future, and Frederick Ikenson, a member of the Board of Directors, the Customers and International Trade Bar Association, Washington, D.C.

First, I want to apologize to both of you for the lengthy wait, but I think you have been able to hear the testimony that we have received. It is very important testimony to the committee and very important to the members. I would ask if you could summarize your written statements, and then we would have time for questions. Your full prepared statements will be printed in the record as if given, and with that, we will proceed. First with Kristen Allen, agricultural economist.

[Material that Senator Conrad referred to on page 118 follows:]

February 23, 1988

Mr. Joseph E. Ross
Director
Congressional Research Service
Library of Congress
Washington, D.C. 20540

Dear Mr. Ross:

The "U.S.-Canadian Free Trade Agreement" (CFTA) has raised a series of troublesome questions. Following is a list of questions concerning U.S.-Canadian trade and the CFTA. I would greatly appreciate answers by March 15, 1988.

U.S.-CANADIAN AGRICULTURAL TRADE AND SUBSIDIES. 1. Does Canada currently allow any U.S. grain--wheat, rice, corn, sorghum, barley, or oats--to be imported? If so, in what amounts and under what conditions?
2. Does U.S. grain exported to Canada enjoy the preferential rail transportation rates enjoyed by Canadian grain moving in Canada? Will U.S. grain exports to Canada under the CFTA enjoy such preferential rates?
3. Does Canadian grain milled or malted for domestic Canadian food use pay full rail rates or subsidized rates?
4. Does Canadian grain bound for Thunder Bay and export receive a rail subsidy? Does grain used in Canada for feed enjoy a rail subsidy? Do non-grain products enjoy rail transportation subsidies? What percentage of Canadian grain exports go through the Thunder Bay and eastern ports compared to western ports?
5. How much grain does Canada have in storage? How much storage space do they have available? Is the storage public or private? Is Canadian storage subsidized through either payments or loans?
6. Do the Canadians subsidize the milling, malting, or refining of any Canadian agricultural products? If so, to what extent?
7. Do the Canadians subsidize the production, the transportation, slaughtering and packing of livestock? If so, to what extent?
8. In which markets do U.S. and Canadian farm products compete?

9. Please provide a comparison of food prices in the U.S. and Canada.
10. How much sugar or sugar (beet or cane) products does Canada produce domestically each year? What is their domestic sugar price? How much sugar do they import from other countries? How much do they consume domestically? How much do they export to other countries in raw, refined, or as part of food products? How much do they export to the U.S. in raw, refined, or as part of food products? What are the sources of their sugar imports? What is their quota for the U.S. market? Have any Canadian exporters to the U.S. ever been accused of violating the quota? Have any exporters been found guilty of violating the quota?
11. What is the level of subsidies to agriculture provided by the Canadian provinces?
12. What is the level of import tariffs imposed by Canada and the U.S. on agricultural products? On which agricultural products does Canada or the U.S. impose quotas?
13. Has the relative production of Canada versus the U.S. of any agricultural products changed over the last 10 years? If so, how?

CANADIAN LAW AND CONSTITUTION: 1. Do any provincial governments have provincial laws which prohibit the use of foreign agricultural products in processing, feeding of livestock, or any other uses?
2. Does any provincial law prohibit the export of raw materials for processing outside of Canada? I have heard that gold ore mined in Canada must be smelted in Canadian smelters.
3. Must the provinces of Canada formally ratify the treaty for the treaty to take effect in the provinces? Please explain the ratification process in Canada.
4. Must the parliament of Canada and its provinces change existing federal and provincial law for all portions of the treaty to take effect in all of the provinces?
5. If a province fails to ratify the treaty or to amend provincial law to make it consistent with the treaty, does the treaty or provincial law reign supreme?
6. Do Canadian or provincial courts interpret the agreement in Canada or will their laws related to the agreement be interpreted by a bilateral body?
7. Under the treaty, will provinces be free to pass laws in contravention of the agreement?
8. It is clear that federal law and international treaties supersede state laws in the U.S. However, it is not so clear that federal law and international agreements have the same status in Canada. What is the relationship between federal and provincial laws and parliaments in Canada?

NATURAL RESOURCES: 1. Does Canada or its provinces subsidize the production (mining or smelting) of natural resources in Canada? If so, please enumerate the subsidies.
2. Does Canada or its provinces restrict the export of raw natural resources? Does Canada require that natural resources be refined in Canada?
3. Does Canada subsidize the production of energy including electricity for sale in Canada and for export? If so, what is the extent of the subsidy? Does Canada sell electricity or any natural resource product for less in the U.S. than domestically? If so, which products and what are the relative sales prices?
4. What studies are available concerning the effects of the CFTA on trade in energy and natural resources?
5. Does Canada have less or more restrictive clear air and other environmental requirements for coal fired plants?

GENERAL ISSUES: 1. Does the agreement specifically prohibit transshipment of goods through Canada to the U.S.?
2. If Canada chooses to dump the 500 million bushels of wheat they have in storage on the U.S. market, is there anything we could do to stop them; i.e., would we still be able to apply Section 22 quotas or tariffs?
3. Will third countries be able to transship sugar products, textiles, and other quota items through Canada?
4. Please send copies or references to any studies, either Canadian or U.S., of the effects of the CFTA on the U.S. or Canada.

Finally, while my staff greatly appreciated the opportunity the CRS seminar offered to learn more of the general provisions of the CFTA, many of their questions and mine remain unanswered. I believe that it would be in the best interests of the Congress if CRS would arrange seminars on specific issues in order to answer detailed questions concerning a wider variety of issues. Specifically, one day sessions with both supporting and opposing views would be useful for agriculture, natural resources, manufacturing, legal and constitutional issues in Canada and the U.S., and potential effects on our negotiating position at the GATT negotiations.

Thank you very much for your assistance.

Sincerely,

KENT CONRAD
United States Senate

KC:wkh

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WASHINGTON, D.C. 20540

LAW LIBRARY
AMERICAN-BRITISH LAW DIVISION

MAR 18 1988

Attention: Kent Hall

Dear Senator Conrad:

In response to your request for information on Canadian law and the Canadian Constitution, we have prepared the enclosed responses to questions 1-8 on page 2 and questions 1 and 3 of the general issues you raised on page 3 of your letter of February 23, 1988 to Mr. Joseph Ross.

Please contact us if we can be of any further assistance.

Sincerely,

Stephen F. Clarke

Stephen F. Clarke
Senior Legal Specialist
287-5077

Enclosures

Honorable Kent Conrad
United States Senate
361 Dirksen Senate Office Building
Washington, D.C. 20510

CANADIAN FREE TRADE AGREEMENT

1. The available laws and regulations of Canada's provinces do not indicate that they prohibit the use of foreign agricultural products in processing, the feeding of livestock, or similar types of situations.

2. Several Canadian provinces have laws that generally prohibit the export of ores for processing outside of Canada. For example, section 2 of British Columbia's Mineral Processing Act states as follows:

> 2. All minerals produced in the Province shall be processed, smelted and refined in the Province subject to this Act and the availability of processing, smelting and refining facilities in the Province. 1/

Similarly, section 104 of Ontario's Mining Act provides that:

> 104.--(1) All lands, claims or mining rights patented, leased or otherwise disposed of under this or any other Act or by any authority whatsoever are subject to the condition that all ores or minerals raised or removed therefrom shall be treated and refined in Canada so as to yield refined metal or other product suitable for direct use in the arts without further treatment, in default whereof the Lieutenant Governor in Council may declare the lease, patent or other form of title of such lands, claims or mining rights to be void, and the order in council so declaring shall be registered in the proper land registry office, or in the case of a licence of occupation, filed in the Minister's office, whereupon such lands, claims or mining rights revert to and become vested in Her Majesty, Her heirs and successors, freed and discharged of any interest or claim of any other person. 2/

To the extent to which these statutes go beyond setting contractual terms in the alienation of Crown properties, the above sections may be unconstitutional interferences with the exclusive powers of Parliament to regulate "international trade and commerce." 3/ Section 92A of the Constitution Act allows the provinces

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1/ B.C. Rev. Stat. ch. 261 (1979).

2/ Mining Act, Ont. Rev. Stat. ch. 268 (1970).

3/ Constitution Act, 1867, 30 & 31 Vict. ch. 3, § 91.

to make laws relating to the export of non-renewable natural resources to other parts of Canada but not to exports to foreign countries.[4/]

3. The power to enter into international agreements is a Crown prerogative that has always been exercised by the Federal Government of Canada.[5/] Thus, the Federal Government is constitutionally competent to assume international obligations on behalf of the Dominion of Canada without first obtaining the approval of the provinces or any group of provinces.[6/] Provincial assemblies can vote on resolutions to express support for, or opposition to, a treaty entered into by the Federal Government, but such resolutions can not affect the validity of that treaty under Canadian law. In the case of the Free Trade Agreement, the Federal Government would like to see all of the provinces express their support for the final text in either a formal or informal manner, but it does not have to wait for such support to be expressed before proceeding to implement the Agreement.

As for the roles of the House of Commons and Senate, it is well-established that "[t]he Canadian Parliament plays no necessary role in the making of treaties."[7/] In other words, just as it can assume international obligations on behalf of the Dominion of Canada without the approval of the provinces, so too can the Federal Government assume international obligations on behalf of the Dominion of Canada without the approval of Parliament.

4/ Id. as amended by the Canada Act, 1982, § 50.

5/ A. Gotlieb, Canadian Treaty-Making 4 (1968) (See enclosed photocopy).

6/ P. Hogg, Constitutional Law of Canada 242-243 (1985) (See enclosed photocopy).

7/ Id. at 244.

However, two qualifications must be added to this statement. Firstly, the Federal Government must obtain the approval of Parliament before a treaty that expressly requires Parliamentary assent can become binding upon the Dominion under Canadian law. Secondly, the Federal Government must obtain the approval of Parliament to make any changes to federal statutes that are required by a treaty.[8/]

The Free Trade Agreement does not require formal ratification. Article 2105 of this document simply states that it "shall enter into force on January 1, 1989, upon an exchange of diplomatic notes certifying the completion of necessary legal procedures by each party."[9/] Therefore, the Agreement does not oblige the Federal Government to move resolutions of approval in the House of Commons and Senate before seeking to implement the changes to the extant federal statutes that are required by the treaty. However, because the pact is of such importance to Canada, tradition suggests that such resolutions should be introduced in the House of Commons and Senate before any votes are taken on the legislation introduced to implement the Agreement.[10/] The questions of whether and in what manner traditions should be followed involve strategic considerations. Therefore, the Federal Government has not yet stated its full intentions in this regard. However, the likelihood is that resolutions of approval will be introduced shortly before or at the same time the implementing legislation is introduced in Parliament.

8/ Id.

9/ United States-Canada Free Trade Agreement, art. 2105 (unpublished).

10/ Supra note 6, at 244.

4. Canada does not have a doctrine of "self-executing treaties" nor a rule that treaties are "the supreme law of the land." To become part of the substantive law of Canada and enforceable by Canadian courts, the provisions of an international agreement that are at variance with or not part of the domestic Canadian law must be implemented.[11/] Although the Federal Government can usually change federal regulations and policies to implement the provisions of a treaty, the approval of Parliament is required to amend federal statutes and the assistance of the provincial assemblies to amend any offending provincial laws, regulations, or policies that it cannot override.

In the case of the Free Trade Agreement, the Federal Government will have to amend many of its extant regulations to conform with the terms of the pact. For example, the tariff schedules to the Customs Tariff Act will have to be completely revised.[12/] The approval of Parliament will also have to be obtained to make many federal statutes conform with the Agreement. For example, the Investment Canada Act will have to be completely redrafted.[13/] However, it is not clear whether the Federal Government will have to secure the cooperation of the provinces to implement the Free Trade Agreement. This is a very contentious issue.

At the present time, it does not appear that many provincial laws or policies are inconsistent with Canada's obligations under the Agreement. The major exception in this regard are the changes to provincial liquor laws and policies required by chapter 8 of the Free Trade

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11/ Id. at 245.

12/ R.S.C. ch. C-41(1970), as amended.

13/ 1985 Can. Stat. 419.

Agreement.[14/] Other offending provincial laws or policies are almost certain to be eventually exposed, but the results of any search for provincial laws that are potential candidates for change are not yet available.

5. The Premier of the Province of Ontario, a strong opponent of the Free Trade Agreement, has consistently indicated that he will not introduce any changes to the laws and policies of his province, including those involving the sale of wine and spirits, that the Agreement may require.[15/] Two other Premiers, one of whom's government has just fallen, have also suggested that they will not change any of their laws or policies as a consequence of the Federal Government entering into the trade pact. Many commentators feel that these Premiers have been "bluffing."[16/] Even the Premier of Ontario has indicated that this unwillingness to cooperate could cause a great deal of resentment to rise against his government all across the country.[17/] Nevertheless, the public posture of the Premier of Ontario has raised the question of what will happen if the Province of Ontario does not change any of those laws that offend the Free Trade Agreement.

Ever since the Judicial Committee decided what is known as the Labour Conventions case in 1937,[18/] the established rule of Canadian constitutional law has been that Parliament can only pass legislation to implement the provisions of a treaty that pertains to matters within

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14/ Financial Post, Jan 25, 1988 (See enclosed photocopy).

15/ Id.

16/ R. Sullivan, "Jurisdiction to negotiate and implement free trade agreements in Canada: Calling the provincial bluff, 24 U.W.O.L.R. 63 (See enclosed photocopy).

17/ Supra note 14.

18/ Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326 (P.C.).

its jurisdiction under domestic Canadian law. In other words, unlike the Congress of the United States, Parliament has always lacked a "treaty-power" to override inconsistent non-federal laws. The Labour Conventions case has been severely criticized and several constitutional scholars have suggested that the Supreme Court might be prepared to overturn it in a proper case.[19/] Nevertheless, most scholars agree that the Labour Conventions case struck a constitutional balance that is consistent with Canadian traditions when it precluded Parliament from encroaching upon provincial powers by entering into international agreements.[20/] Therefore, the chance that the Federal Government would be able to justify Parliament overriding any inconsistent provincial laws on the grounds that it enjoys an, as yet unrecognized, treaty-power appears remote.

On the other hand, although Parliament's power to regulate international trade and commerce has been traditionally interpreted very narrowly, the Supreme Court of Canada has recently expanded it and the Federal Government could make a very strong case that Parliament is competent to override provincial laws and policies that are inconsistent with the Free Trade Agreement because it is exclusively competent to regulate international trade and commerce. In order to complete the Trade Agreement, the Federal Government had to make certain concessions respecting provincial liquor laws. But, it cannot be said that the Federal Government went out of its way to usurp provincial powers over the sale of wine

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19/ Supra note 16, at 68.

20/ Id. at 69.

and spirits. Therefore, the Supreme Court would likely be sympathetic to its case.[21/] Nevertheless, there is no precedent for upholding a federal law that would override a valid provincial law on the ground that it pertains to trade and commerce, which now has an international dimension as the result of Canada's entering into an international agreement.

6. Canada does not have separate federal and provincial court systems in the same way that the United States has separate federal and state court systems nor are there any tribunals that are the joint creation and responsibility of its Federal and provincial governments. The Supreme Court and the Federal Court are the only national courts in the country. The former has jurisdiction to resolve matters raised in any Canadian court and the latter has jurisdiction to hear appeals from the decisions of federal agencies. Following the entry into force of the Free Trade Agreement, questions concerning the constitutionality of the laws passed to implement it would normally first be heard in one of the highest trial courts of the individual provinces. An appeal of the decision of that tribunal could be taken to the Court of Appeal for the involved province and then on to the Supreme Court. Appeals from decisions of Canada's customs or other trade officials would go to the Federal Court of Canada or to dispute resolution under the terms of the Free Trade Agreement.[22/]

21/ Id. at 71-81.

22/ Dispute settlement is covered in chapters eighteen and nineteen of the Free Trade Agreement.

7. Unless the Federal Government is determined to have jurisdiction to enact the entire Free Trade Agreement by virtue of its power to regulate international trade and commerce or the Labour Conventions case is overturned, Canada's provinces will probably be free to pass laws that are intra vires the provinces, even if they conflict with the Agreement. Although seven provincial governments have expressed their support for the Free Trade Agreement, they are free to change their minds.[23/] The violation of such a pledge might, however, contravene an unwritten constitutional convention. Constitutional traditions are not legally binding, but Canadian governments are usually extremely reluctant to breach them.[24/] This is one reason why the law in this area has remained somewhat unclear.

8. Parliament has lacked the power to implement the provisions of a treaty by overriding inconsistent provincial enactments since the Labour Conventions case was decided in 1937.

General Issues

1. The Free Trade Agreement does not prohibit transhipments of goods through Canada to the United States.

23/ Supra note 6, at 261-262.

24/ Id. at 12-13.

2. Canadian law allows for the transhipment to the United States of goods that originated in third countries.

Prepared by
Stephen F. Clarke
Senior Legal Specialist
American-British Law Division
Law Library, Library of Congress
March 1988

89-916 O - 88 - 6

Senator Wendell H. Ford
April 21, 1988

TREATY IMPLEMENTATION AND PROVINCIAL JURISIDCTION IN CANADA

In the Labour Conventions Case, 1937 A.C. 326, the Privy Council of Canada held that jurisdiction to legislate for the purpose of performing the obligations of a Canadian treaty does not reside exclusively in the Parliament of Canada. In Canada, legislative powers are constitutionally distributed between the Dominion and the Provinces. The Council said if a treaty affects classes of subjects under Provincial jurisdiction, legislation to support the new functions is within the competence of the Provincial Legislatures only. It also held that the Dominion could not, merely by making a treaty with other countries, vest itself with legislative authority inconsistent with the constitution.

The case dealt with two statutes enacted by the Dominion Parliament in accordance with the conventions adopted by the International Labour Organization pursuant to the 1919 Treaty of Versailles, to which Canada was a party. Each statute admittedly affected property and civil rights within each Province. The Council said these subjects are exclusively assigned by S.92 to the Legislatures of the Province and there is no constitutional ground for stretching the Dominion's treaty-making authority to include subjects exclusively in the jurisdiction of the Provinces.

The Ontario Attorney General, Ian Scott, recently referred to the Labour Conventions Case as follows:

> We next turn to the subject matter of the treaty becuse the question immediately arises, what happens if the federal government makes a treaty and promises to do certain things that it has no power to do? . . . That question has been decided for us by the Supreme Court of Canada in a case called the Labour Conventions Case in which it basically held that while the federal government has the power to make a treaty, the federal government in Canada does not have the power to implement that treaty in areas of provincial jurisdiction. That is why in our legislature, when a treaty is made to advance some interest of the United Nations, perhaps having to do with arbitration -- this committee will have seen certain bills in that behalf -- the provinces are asked to implement it within areas of provincial jurisdiction. It is precisely because the federal government has no power to implement it in areas that are exclusively provincial under our constitution.

4/18/88

[No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[8]]

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Editor's Note:
The following material is an excerpt from the Canadian Treaty-Making article.

Canadian Treaty-Making

by

A. E. GOTLIEB

TORONTO
BUTTERWORTHS
1968

treaties in Canada and the question of provincial agreements. The first subject—treaty implementation—raises questions of constitutional law and practice relating to how the Canadian federal system works in respect of the performance of treaties. Treaty implementation thus lies beyond the ambit of this analysis but because it is relevant to its main theme, the matter is dealt with in a very general way in one of the parts of this study.[2] The second topic—provincial agreements—also involves questions of Canadian constitutional law as well as of international law, but as Canadian practice in this area is slight and as the subject has been discussed mainly in the context of constitutional change in Canada, this study does not deal with the matter other than in general terms.[3]

2. The Treaty Power and the Executive

In Canada, the power to make, or enter into, a treaty is possessed by the Crown. It is therefore a power that belongs to the executive branch of the Canadian Government, and not to the Parliament of Canada. The capacity of the Crown to enter into treaties derives from the common law of England which recognized in the sovereign a number of "prerogative" powers, some of which the Crown, both in England and Canada, has continued to possess to this day. By "prerogative" rights, "we mean a right that remains in the Sovereign as one of that bundle of discretionary common law rights which were, at and by the common law, exercisable by the Sovereign in person, and we use that term whether the prerogative in question is or is not now exercisable by the Sovereign in person or through him by his representative . . .".[4] Over a period of centuries, Parliament has taken away, through legislation, many of the powers of the Sovereign, but those which it retained continue to be known as "prerogative" powers.

Prominent among the prerogative powers are those in the field of foreign affairs, including ". . . the power to do all acts of an international character, such as the declaration of war and neutrality, the conclusion of peace, the making or renouncing of treaties, and the establishment or termination of diplomatic relations".[5] In Canada, as in England, these prerogative powers in the field of foreign affairs, including the treaty-making power, are exercised on the advice of the ministers of the Crown. This means, in effect, that the treaty-making power in Canada is exercised by the Governor-

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[2]See *infra*, Section 20.
[3]See *infra*, Section 8.
[4]W. F. O'Connor, *Report to the Honourable Speaker of the Senate of Canada on The British North America Act, 1867* (1939), p. 146.
[5]R. McGregor Dawson, *The Government of Canada* (4th ed., 1963), p. 158.

General in Council on the advice of the Canadian ministers and, in particular, the minister responsible for foreign relations, the Secretary of State for External Affairs.[6]

The Queen does not have any direct role in Canadian treaty-making under contemporary Canadian practice. Since the issue by the Sovereign of the Letters Patent of 1947, the Governor-General is legally authorized to exercise all the powers of the Crown in respect of Canada. However, in respect of a few specific formal matters, it was understood that, although the Governor-General, acting on the advice of Canadian ministers, had full legal authority to act, the Queen, acting on the advice of the Canadian (not British) ministers, would, for the time being, continue to exercise these powers. "Canadian prerogative powers . . . are thus divided into those customarily performed by the Crown in Canada and those customarily performed by the Crown in England on Canadian advice. . . ."[7] The latter category included signature of the authority ("full-powers") for the signing of treaties in the Head-of-State form, and signature of ratifications of such treaties.[8]

An enquiry into the extent to which these various prerogative powers continue to be exercised by the Queen lies outside the scope of the present analysis.[9] It is sufficient to note that, from the standpoint of Canadian treaty practice, those prerogative powers exercisable by the Queen no longer come into play as Canada has not, for some time, made treaties in the Head-of-State form. Therefore, neither the ratification nor issuance of authority to sign treaties ("full powers") require any personal action by the Sovereign. The evolution and nature of Canadian practice in this respect since World War II is discussed in Section 10, *infra*.

As the Government of Canada is responsible to Parliament, the latter body achieves indirect control over the treaty-making power by means of the normal functioning of the Parliamentary system. If the Government is considered to have abused or mismanaged this power, then the Government may be defeated by a vote in Parliament or not returned at the next Parliamentary election. In Canada, Parliament has formally recognized the prerogative responsibilities of the Government in the field of foreign affairs. In 1909 Parliament

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[6]See memorandum of July 21, 1952, submitted by Canadian Government for inclusion in United Nations Legislative Series, "Laws and Practices Concerning the Conclusion of Treaties" (St/Leg/Ser.B/3, 1953), at p. 24.

[7]R. M. Dawson, *The Government of Canada* (4th ed., 1963), pp. 158-159.

[8]See statements of Prime Minister St. Laurent in House of Commons, House of Commons Debates, February 12, 1948, p. 1126, and February 16, 1948, p. 1229.

[9]For an account of the present constitutional position with respect to the personal exercise of these powers by the Sovereign, see A. E. Gotlieb, "Canadian Practice in International Law, 1965", in (1966) 4 Canadian Yearbook of International Law, at pp. 271-273.

established a new minister of the Crown in Canada, the Secretary of State for External Affairs, who was entrusted (as Head of the Department of External Affairs which, according to the Act, was to function under him) with ". . . the conduct of all official communications between the Government of Canada and the Government of any other country in connection with external affairs of Canada. . .".[10] Occasionally, Parliament has expressly recognized the executive's choice of other ministers to make international agreements in certain specific areas but this has happened only rarely. A recent example is found in the Canada Pension Plan in which Parliament authorized the Minister of National Health and Welfare to enter into agreements with foreign governments for the making of certain reciprocal arrangements relating to the administration or operation of the Canada Pension Plan or similar laws of foreign states.[11]

The relations between the Crown and Parliament, in respect of the treaty power, are discussed in Section 6 of this study.

3. The Treaty Power and Dominion Status

The achievement of dominion status and independence by Canada, particularly in the period from the beginning of the century to the outset of the Second World War, has been discussed by many authors. The steps taken towards the development of full independence in the international sphere are briefly noted in order to provide a description of the way in which Canada, as a part of the British Empire, acquired the right to the exercise of the treaty-making power and, through it, international recognition of a status of equality within the Commonwealth and of an independent status in the world community.

The British North America Act does not touch directly upon the subject of treaty-making in Canada. The assumption in 1867 was that the treaty-making power would continue to reside in the Crown in London to be exercised on the advice of the British ministers. For this reason the only provision of the Act referring to treaties was

[10]Stat. Can., 8 Edw. VII, c. 13. For the text of the Act, as revised, see R.S.C. 1952, c. 68, entitled "An Act Respecting the Department of External Affairs".

[11]Section 109(1) of the Canada Pension Plan, Stat. Can. 1964-65, c. 51. Another example is the case of international postal agreements which are the responsibility of the Postmaster-General under the Post Office Act. See R.S.C. 1952, c. 212, s. 5(1)(j), as amended. See also the Aeronautics Act, R.S.C. 1952, c. 2, s. 3(h) requiring the Minister of Transport "to take such action as may be necessary to secure, by international regulation or otherwise, the rights of Her Majesty in respect of Her Government of Canada in international air traffic". And Stat. Can. 1958, c. 29, s. 56(2), a law concerning taxation of estates, which authorizes the Minister of National Revenue to make agreements with foreign governments concerning exchange of information in this field.

section 132 which related not to the making of treaties, but to their performance or implementation within Canada. It provided that the Canadian Parliament

> " . . . shall have all the powers necessary and proper for performing [i.e., implementing] the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

Thus, in 1867, and for the next half century, the capacity to make treaties on behalf of Canada, as distinguished from the power to implement them through legislation, existed exclusively in London. However, throughout the nineteenth century there was a steady movement towards the autonomous status of the dominions in the British Empire. In the period 1871-1923, procedures slowly evolved by which Canadian Government representatives at first participated in international negotiations leading to an Imperial treaty affecting Canada (Washington Treaty of 1871);[12] then came both to negotiate and co-sign commercial treaties affecting Canada or to adopt them through informal administrative arrangements without having recourse to London;[13] later signed agreements as an (autonomous) member of the Empire (Treaty of Versailles, 1919);[14] and finally negotiated and signed such agreements independently on behalf of Canada (Halibut Fisheries Convention, 1923).[15]

Canada's growing separate international identity was reflected in the practice—started in 1915 and continuing to the present day—for the Under-Secretary of State for External Affairs to give an account of treaty ratification in a separate section of his annual report which, since 1909, the Secretary of State for External Affairs has been required to submit annually to Parliament under the Department of External Affairs Act.[16] While during the early years of the history of the Department of External Affairs, treaties applying to Canada were still signed and ratified by His Majesty on the advice of the British Government, the section on treaties in the Department's reports to Parliament makes clear the separate and

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[12]See *Treaties in Force between His Majesty and U.S.A., 1814-1925*, p. 37.

[13]For an account see W. P. M. Kennedy, *The Constitution of Canada, 1534-1937*, at pp. 348-349 (Oxford University Press, 2nd ed., 1938).

[14]British Treaty Series, 1919, No. 4. Each dominion parliament signified separately its approval of the Versailles Treaty which was then ratified by His Majesty on behalf of the whole Empire. See Sir Robert Borden's speech proposing a resolution of approval in the Canadian House of Commons on September 2, 1919. House of Commons Debates, September 2, 1919, pp. 13-22.

[15]Convention between United States of America and Canada for Preservation of Halibut Fisheries of the Northern Pacific Ocean, signed at Washington, March 2, 1923, Instruments of Ratification exchanged at Washington, October 21, 1924.

[16]Pursuant to s. 6 of the Act (R.S.C. 1952, c. 68).

Editor's Note: The following material is an excerpt from Making Treaties.

CONSTITUTIONAL LAW OF CANADA

Second Edition

by

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(b) Power to make treaties

Because a treaty is an agreement which is binding in international law, a treaty can only be made by an entity having international legal personality. In 1867 the various colonies of the British Empire, although many of them (including those of British North America) were self-governing in domestic affairs, lacked the capacity to enter into treaties. The Empire spoke with one voice, and the voice was that of the imperial government in Great Britain. The common law accorded to the Crown (the executive branch of government in Great Britain) full power to conduct foreign affairs, including the making of treaties, for the entire Empire. In 1867, therefore, it was the British government which entered into treaties binding the Empire, or any part of the Empire. As the Empire became the Commonwealth, and as its members acquired international personality in their own right, the treaty-making powers of the British government were gradually distributed to the independent members of the Commonwealth.[2]

In Canada's case the formal grant of treaty-making power is not to be found in the Constitution Act, 1867 (which did not contemplate that Canada would become an independent nation), but in the instrument by which the King or Queen in Great Britain delegated the prerogative powers over foreign affairs to the Governor General of Canada, who would exercise the powers upon the advice of the Canadian government. The current instrument of delegation is a comprehensive document which was adopted in 1947 and which is entitled Letters Patent constituting the office of Governor General of Canada.[3] In this document, no prerogative power over Canada is withheld: by clause 2 the Governor General is authorized "to exercise all powers and authorities lawfully belonging to Us [the King] in respect of Canada". This language undoubtedly delegates to the federal government of Canada the power to enter into treaties binding Canada.

Even without an express delegation of treaty-making power, Canada's achievement of full independence would necessarily carry with it the power to enter into treaties, and in the absence of any contrary constitutional provision the power would be located with the executive branch of the government which represents the country as a whole, namely, the federal government.[4] In recent years, there has been a claim that the Canadian provinces possess treaty-making competence under the Constitution and in international law. This claim will be examined at the end of this chapter,[5] because it can be understood only in the light of the constitutional law respecting the implementation of treaties. For the moment, it suffices to say that the provincial claim has never been accepted by

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2 See Kennedy, *The Constitution of Canada 1534-1937* (2nd ed., 1938), chs. 20, 25 and pp. 510-518; Hopkins, *Confederation at the Crossroads* (1968), ch. 11; Stanley, *A Short History of the Canadian Constitution* (1969), ch. 7; Jacomy-Millette, *Treaty Law in Canada* (1975), Part I.

3 It is reproduced in R.S.C. 1970, Appendix II, No. 35.

4 For explanations of the source of federal treaty-making power, see Gotlieb, *Canadian Treaty-Making* (1968), 28-30; Morris, The Treaty-Making Power (1967) 45 Can. Bar Rev. 478, 482-484.

5 Page 254, below.

the federal government, and the federal government does in fact exercise exclusive treaty-making powers.

(c) Procedure for making treaties

(i) *Signing*

International law does not prescribe any formal procedures for the making of treaties, and there are a variety of procedures in use. The most formal treaty is in "head of state" form, which means that for Canada the Queen would be named as a party. Until 1947, treaties in head of state form required a formal act by the King in London, but since 1947 it has become possible to conclude all formalities in Canada.[6] However, the treaty in head of state form has become so unusual in international practice that Canada has never since 1947 had occasion to use its new formal powers.[7] The treaty in head of state form has been supplanted by its less formal cousin, the treaty in intergovernmental form, which is a treaty in which the governments (not the formal heads of state) of the agreeing states are named as the parties. Treaties in intergovernmental form are signed by an official (called a plenipotentiary) who acts under the authority of an "instrument of full power", which is a document signed by the foreign minister (for Canada the Secretary of State for External Affairs) granting to the plenipotentiary "full power" to sign the treaty.[8] A third kind of treaty, which is less formal than the treaty in intergovernmental form, and which is now more common, is the treaty in exchange-of-notes form. This is concluded by an exchange of notes (or letters) between the two agreeing states; the notes may be signed by the states' foreign ministers or by ambassadors or high commissioners or even by a minister in charge of a department other than external affairs.[9] A treaty in exchange-of-notes form does not consist of a single formal document, but of two documents: the first is the note in which one state proposes to another the terms of the agreement, and the second is the note in reply in which the other state accepts the proposed terms. Multilateral treaties are rarely concluded in exchange-of-notes form.

(ii) *Ratification*

Treaties in exchange-of-notes form and some treaties in intergovernmental form come into force on the signing of the agreement, or the delivery of the

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6 Before 1939 any document which required authentication under the Great Seal of the Realm had to be sealed in London, because Canada had no Great Seal of its own. The Seals Act, S.C. 1939, c. 22, created the Great Seal of Canada, and obviated the necessity to send documents to London for sealing. But treaties in head of state form still had to go to London for the King's approval prior to sealing in Canada, because the Governor General lacked the authority to give this approval. This disability was removed in 1947 with the adoption of new Letters Patent constituting the office of Governor General: note 3 and accompanying text, above.

7 Gotlieb, *Canadian Treaty-Making* (1968), 40.

8 Gotlieb, previous note, 87, gives an example of an instrument of full power.

9 *Id.*, 33.

second note (the reply to the first note), or on a date specified in the agreement.[10] A treaty of a more formal character will often provide that it does not come into force until it has been "ratified" by the states which have signed it. In keeping with the general tendency towards less formality in international relations, only a minority of treaties now require ratification before they come into force. For a Canadian treaty in intergovernmental form which does require ratification, the Secretary of State for External Affairs will sign an "instrument of ratification" which certifies that the government of Canada ratifies the treaty. In the case of bilateral treaties, the two states will then exchange the instruments of ratification in a brief formal ceremony. In the case of multilateral treaties, the treaty will provide that instruments of ratification be deposited with a specified government or international organization, and the "depositary" will be under a duty to inform all parties of ratifications which have been deposited.[11]

(iii) *Role of Parliament*

The Canadian Parliament plays no necessary role in the making of treaties. The negotiation and conclusion of a treaty is part and parcel of the conduct of international relations, and the conduct of international relations has always been one of the prerogatives of the Crown; in other words, the executive branch of government has the power to make treaties without the necessity of parliamentary authority. There is no legal requirement that the Parliament give its approval to either the signing or the ratification of a treaty.[12] The position in the United States is different. The United States' Constitution, by article 2, s. 2(2), empowers the President to make treaties only with the approval of a two-thirds majority in the Senate. The executive of the United States is therefore obliged by its constitutional law to obtain the approval of one house of the Congress as part of the process of making a treaty.[13]

Despite the absence of any constitutional obligation to obtain parliamentary approval, it has been the practice of Canadian governments to obtain parliamentary approval of the most important treaties in the interval between signing and ratification. The government will lay the treaty before Parliament and move a resolution in each House approving the treaty. The resolution is not in statutory form, and does not receive royal assent. Of all the treaties which Canada ratified between 1946 and 1966 approximately one quarter were submitted to Parliament for approval. However, there is no practice of securing Parliament's approval of treaties which do not require ratification, and these are now the more common kind of treaty.[14]

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10 *Id.*, 33-34.
11 *Id.*, 37-49.
12 *Id.*, 14. As we shall notice later in the next section of this chapter, however, the implementation of a treaty, if it involves a change in the internal law of Canada, will require a statute enacted by the Parliament of Canada, or the provincial Legislatures, or both.
13 This requirement may be avoided by the President entering into an "executive agreement"; see note 18, below.
14 Gotlieb, note 7, above, 18.

2. Implementing treaties

(a) The need for legislation

The narrative so far has been concerned with the making of treaties, that is to say, the formation of treaty obligations. But the making of a treaty must be distinguished from the implementing of the treaty, that is to say, the performance of the treaty obligations. As soon as a treaty is made and in force, the states which are parties to the treaty come under an obligation in international law to implement the treaty.

Canada's constitutional law, derived in this respect from the United Kingdom, does not recognize a treaty as part of the internal (or "municipal") law of Canada. Accordingly, a treaty which requires a change in the internal law of Canada can only be implemented by the enactment of a statute which makes the required change in the law. Many treaties do not require a change in the internal law of the states which are parties. This is true of treaties which do not impinge on individual rights, nor contravene existing laws, nor require action outside the executive powers of the government which made the treaty. For example, treaties between Canada and other states relating to defence, foreign aid, the high seas, the air, research, weather stations, diplomatic relations and many other matters, may be able to be implemented simply by the executive action of the Canadian government which made the treaty.[15] But many treaties cannot be implemented without an alteration in the internal law of Canada. For example, treaties between Canada and other states relating to patents, copyrights, taxation of foreigners, extradition, and many other matters, can often be implemented only by the enactment of legislation to alter the internal law of Canada.[16]

The rule that a statute is needed to implement a treaty which involves a change in Canada's internal law contrasts with the rule in the United States. The United States' Constitution, by article 6, simply makes "all treaties" part of "the supreme law of the land". The reason for this difference between Canada and the United States lies in the different procedures for making treaties. We have already noticed that in the United States the Constitution requires the President to obtain the approval of the Senate before he concludes a treaty.[17] It is therefore easy to understand why the Constitution incorporates the treaty into the internal law of the United States.[18] But in Canada, where there is no constitutional

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15 However, any expenditure of money requires parliamentary appropriation.

16 See Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dal. L.J. 307; Castel, *International Law* (3rd ed., 1976), ch. 2.

17 Page 244, above.

18 Senate approval is not required for an "executive agreement", which is an agreement between the President and a foreign country. An executive agreement has been held not to be a "treaty" within article 2, s. 2(2) of the U.S. Constitution; and is therefore not subject to the requirement of Senate approval. However, in international law such an agreement is an informal treaty which is just as binding as a formal treaty. Moreover, the courts of the United States have accepted that an executive agreement, while not a treaty under article 2, s. 2(2), is a valid treaty for other purposes and is part of "the supreme law of the land" under article 6: *U.S. v. Belmont* (1937) 301 U.S. 324; *U.S. v. Pink* (1942) 315 U.S. 203.

requirement of parliamentary approval prior to the making of a treaty, it would offend against the basic principle of parliamentary supremacy if the executive could alter the law of the land merely by making a treaty.

It follows that the courts of Canada (and of other countries with British-derived constitutions) will not give effect to a treaty unless it has been enacted into law by the appropriate legislative body; or, to put the same proposition in another way, the courts will apply the law laid down by statute or common law, even if it is inconsistent with a treaty which is binding upon Canada.[19] In a case where Canada's internal law is not in conformity with a treaty binding upon Canada, then Canada is in breach of its international obligations and may be liable in international law to pay damages or suffer other sanctions,[20] but the breach of a treaty is irrelevant to the rights of parties to litigation in a Canadian court. The only concession which the Canadian courts have been prepared to make in recognition of Canada's international obligations is to interpret statutes so as to conform as far as possible with international law.[21] But where the language of a statute is clearly and unmistakably inconsistent with a treaty or other rule of international law, then there is no room for interpreting it into conformity with the international rule and the statute must be applied as it stands.[22]

(b) The federal problem

In a unitary state, there is rarely any difficulty in performing a treaty obligation which necessitates a change in the internal law of the state. In the United Kingdom or New Zealand, for example, once the government has

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19 *Francis v. The Queen* [1956] S.C.R. 618 (refusal to enforce treaty granting customs exemption to Indians); *Capital Cities Communications v. C.R.T.C.* [1978] 2 S.C.R. 141, 173 (refusal to enforce radio communications convention).

20 "A state cannot . . . plead its municipal law as an excuse for failing to fulfil its international obligations": Greig, *International Law* (2nd ed., 1976), 53.

21 *Re Tax on Foreign Legations* [1943] S.C.R. 208; Comment, (1943) 21 Can. Bar Rev. 506; Jacomy-Millette, *Treaty Law in Canada* (1975) 280-290. The proposition in the text is the orthodox one, and it seems to me to be the law of Canada, but it should be noted that it is not without controversy. La Forest (1961) 39 Can. Bar Rev. 78, argues that the provincial Legislatures (but not the federal Parliament) are incompetent to legislate in violation of customary international law (but not treaties). Vanek (1960) 8 U. Toronto L.J. 251, goes even further, arguing that the federal Parliament and the provincial Legislatures are incompetent to legislate in violation of either customary international law or treaties. These views are inconsistent with conventional notions as to the relationship of international law to internal law and the plenary and ample legislative powers of the Canadian legislative bodies. The power of a province to legislate in violation of international law is discussed inconclusively in *Re Alta. Union of Provincial Employees* (1980) 120 D.L.R. (3d) 590, 607-622 (Alta. Q.B.); affd. (1981) 130 D.L.R. (3d) 191 (Alta. C.A.) (holding that denial of right to strike did not violate international law).

22 The text deals with only a small part of the relationship between international law (which includes both customary and conventional (treaty) law) and domestic law (both statutory and common law). For fuller studies, see Claydon, "The Application of Human Rights Law by Canadian Courts" (1981) 30 Buffalo L. Rev. 727; Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can. Bar Rev. 265. As these articles show, the growing body of international human rights law may be an important influence on Canadian domestic law; see also Claydon (1982) 4 Supreme Court L.R. 287; Mendes (1982) 20 Alta. L. Rev. 383.

THE UNIVERSITY OF WESTERN ONTARIO
LAW REVIEW

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BOOK REVIEWS

JURISDICTION TO NEGOTIATE AND IMPLEMENT FREE TRADE AGREEMENTS IN CANADA: CALLING THE PROVINCIAL BLUFF

R.E. Sullivan*

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Introducton

Over the course of the next few years Canada will be participating in a number of efforts to liberalize trade across international borders. A new round of multilateral negotiations under the G.A.T.T.[1] is scheduled for 1986 and bilateral negotiations between Canada and the United States have already begun.[2] If successful, these negotiations will issue in treaties under which Canada will be obliged not only to reduce tarriffs but also to curb a wide range of non-tariff barriers to trade.

The prospect of freer trade with the United States in particular has generated intense debate in Canada. While much of the discussion has focused on the merits of freer trade, and its possible costs, considerable attention has been paid as well to the question of provincial participation in the negotiating and implementing process. Everyone agrees that provincial involvement is essential, but what form that involvement should take and the extent of provincial participation remain controversial matters.

Although this controversy is essentially political in character, it is based on a number of claims and assumptions about the extent of provincial powers under Canadian constitutional law. The key assumption here is one that has been urged

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1. General Agreement on Tarrifs and Trade (1947), 55 U.N.T.S. 187.
2. The first negotiating session took place in Ottawa on May 21, 1986.

most vigorously by Ontario, namely that the provinces are in a position to demand full participation in free trade negotiations with the United States because they enjoy "an effective veto" over the implementation of any agreement that is likely to result from those negotiations.[3] The question to be explored in this paper is the extent to which this provincial self-confidence is justified. From a strictly legal point of view, under Canada's constitution, what role may fairly be claimed by the provinces in the process of negotiating and implementing an international free trade agreement?

Treaty-Making in Canada

Under Anglo-Canadian law the conduct of foreign affairs, including the negotiation and ratification of treaties, is a prerogative of the Crown.[4] It is the Sovereign who speaks on behalf of the nation in its dealings with other members of the international community and the Sovereign's undertakings in this regard are binding on the nation as a whole.[4a] Because Crown prerogatives are powers that are vested in the Sovereign personally, they may be exercised by him or her without the approval or cooperation of Parliament. The Sovereign is bound by constitutional convention to act on the advice of his ministers, but he acts without reference to Parliament, save as a matter of courtesy.

In Canada the various Crown prerogatives are exercised by local representatives of the Sovereign, the Governor-General representing the Crown in right of Canada, and the several Lieutenant-Governors representing the Crown in right of the Provinces. These representatives, of course, act on the advice of their respective ministers so that in practical terms one may say that prerogative powers in Canada are exercised by the federal and provincial governments in place from time to time.

The basic rule governing the distribution of prerogative powers between federal and provincial governments was established by the Privy Council in the *Bonanza Creek* case.[5] There the Board held that, subject to those sections of the *Constitution Act, 1867*[5a] dealing expressly with executive authority and subject as well to the terms of any instrument delegating the powers of the Sovereign to local representatives, the distribution of executive power in Canada follows the distribution of legislative power between Parliament and the provincial legislatures.[6]

The operation of this rule in practice has produced three distinct classes of prerogative powers. The first includes those prerogatives which may be fully exercised by all governments, each acting for the area over which it has territorial jurisdiction. The creation of corporations with the capacity of a natural person is one illustration of this category;[7] another is conferring the honour of Queen's counsel.[8] In the exercise of such prerogatives, federal and provincial governments act with equal and independent authority. Thus, when the Government of Ontario recently abolished

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3. See "Ontario Could Veto Free Trade," *Globe and Mail*, Nov. 8, 1985, at A4, Col. 6, where David Cooke, Chairman of an Ontario legislative committee investigating free trade is reported to have said, "Ontario has an effective veto over any free trade deal negotiated with the U.S." See also "Provinces Renew Bid for Control of Trade Talks," *Globe and Mail*, Feb. 4, 1986, at A1, Col. 2.
4. Hals., 4th, vol. 8, paras. 984-16. For general discussion of the Crown prerogatives, see Mundell, "Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them" (1960), 2 *Osgoode Hall L.J.* 56. For discussion of treaty-making in Canada see Gotlieb, *Canadian Treaty-Making* (1968).
4a. See Blackstone, *Commentaries on the Laws of England*, Vol. 1 (1830), at 256.
5. *Bonanza Creek Gold Mining v. The King*, [1916] 1 A.C. 566.
5a. *British North America Act, 1867*, 30-31 Uict., C. 3 (U.K.), now scheduled to the *Canada Act 1982*, c. 11 (U.K.).
6. See *supra*, note 5, at 580.
7. *Ibid.*
8. See *A.G. Can. v. A.G. Ont.*, [1898] A.C. 247.

the practice of appointing Queen's counsel in Ontario, its decision in no way affected the power of the Governor General to appoint Queen's counsel in that province.

A second category includes prerogative powers that are strictly apportioned between the two levels of government. The power to pardon, for example, is exercised by the Governor General in the case of violations of federal law and by the Lieutenant-Governor of the relevant province in the case of violations of provincial law. Any attempt by a Lieutenant-Governor to pardon for a federal offence would be *ultra vires*.[9]

With respect to the first two categories it is fair to say that the distribution of the prerogative follows the distribution of legislative authority. However, there is a third category in which it is more accurate to say the reverse - that legislative authority follows the allocation of the prerogative. This category includes the Sovereign's claim to a range of territorial and casual revenues which together constitute the *jura regalia*.[10] The royal rights to *bona vacantia* and to treasure trove are examples.[10a] Under section 109 of the *Constitution Act, 1867* these rights are assigned exclusively to the Crown in right of the provinces and it is by virtue of this assignment that the provincial legislatures may deal with them under section 92(5) of the Act.[11]

Given this range of possibilities, the first issue to be resolved is how the power to make treaties for Canada, or for a particular province thereof, is distributed between the federal and provincial governments. It is possible that treaty-making is, like the appointment of Queen's counsel, a fully shared prerogative. This would mean that the federal government has capacity to make treaties on any subject for the whole of Canada while each provincial government has capacity to make treaties, equally on any subject, for each province. While this is a novel suggestion, it has a certain appeal in that it permits maximum scope to both levels of government. The problem of conflicting obligations could be resolved by applying the principle of federal paramountcy.

Alternatively, the treaty-making power may be a divided one such that within areas of federal legislative competence the federal government has capacity to bind the whole of Canada, but within areas of provincial legislative competence the provincial government alone may bind the province by treaty. This analysis is favoured by a number of scholars[12] and since 1969 it represents the position of the Government of Quebec.[12a]

A final possibility is that the treaty-making prerogative is neither shared nor divided but vests exclusively in the Crown in right of Canada and is therefore exercisable at the federal level alone. On this analysis, legislative authority over treaty-making (as distinct from treaty-implementation) would follow the prerogative and vest in Parliament under its residual power to legislate for the peace, order and good government of Canada.

For many years the proper allocation of the treaty-making prerogative has been a hotly debated subject in Canada.[13] However, the recent judgment of the Supreme

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9. See *A.G. Can. v. A.G. Ont.*, (1894) 23 S.C.R. 458.
10. For discussion of the *jura regalia*, see La Forest, *Natural Resources and Public Property Under the Canadian Constitution*, (1969), at 79-83.
10a. *Ibid.*
11. See *A.G. Ont. v. Mercer* (1883), 8 A.C. 767; *A.G. Alta. v. A.G. Can.*, [1928] A.C. 475.
12. See, for example, Morin, "International Law - Treaty-Making Power" (1967), 45 *Can. Bar Rev.* 160 and Atkey, *"Provincial Transnational Activity: An Approach to a Current Issue in Canadian Federalism"*, Ont. Advisory Committees on Confederation, Background Papers and Reports, II, 1970.
12a. See Government of Quebec, Working Paper on Foreign Relations, 1969.
13. For an excellent overview of this debate see Story, "Government, a 'practical thing': Towards a Consensus on Foreign Policy Jurisdiction" in *Canada Challenged: the Viability of Confederation*, ed. by Byers and Reford (1979). See also Levy, "Provincial International Status Revisited" (1976), 3 *Dal. L.J.* "0.

Court of Canada in the *Newfoundland Continental Shelf Reference*[14] goes far toward resolving this debate and offering some indication of the current judicial attitude toward provincial claims to a role in the conduct of foreign affairs.

The Court established a number of important propositions. First, under the constitutional law of Canada only entities which enjoy external sovereignty may operate in the international arena. Such entities alone have the capacity to *receive* the rights and powers conferred on sovereign states by international law; and such entities alone have the capacity to *exercise* those rights and powers.[15] It should be emphasized that these propositions were offered not as observations about international law but as basic postulates of Canadian constitutional law. Under the domestic law of Canada, irrespective of the position at international law, an entity that lacks external sovereignty lacks access to the international arena.

Secondly, the Court held that under Anglo-Canadian law the hallmark and *sine qua non* of external sovereignty is extraterritorial capacity: jurisdiction to pass laws having extraterritorial application and to make executive decisions having extraterritorial effect. The Court posited an exact correlation between extraterritorial capacity and the capacity to receive and exercise the so-called "incidents of external sovereignty", that is, the rights and powers conferred by international law.[16]

The incidents of external sovereignty are exercised by the Crown and include the several prerogatives which together constitute the foreign affairs power: annexing and acquiring new territory, sending and receiving diplomatic envoys, declaring war and so on. The particular incident at issue in the *Newfoundland Reference* was the right to explore and exploit the resources of the continental shelf. However, the Court made it clear that its reasoning applied to all such incidents, including the capacity to make treaties.[17]

Upon application of these basic postulates to the relevant historical facts, the Court had no difficulty in concluding that "the only entity within Canada possessing external sovereignty [is] the Crown in right of Canada."[18] This status was acquired some time between 1919 and 1931, as the external affairs of Canada came to be conducted on the advice of federal ministers, and was officially confirmed by the *Statute of Westminster, 1931*[19] which recognized the extraterritorial capacity of Parliament. The provinces, on the other hand, with the possible exception of Newfoundland, never did acquire this status and as members of the Canadian federation they are constitutionally incapable of doing so.[20] Thus, even if Newfoundland did achieve external sovereignty prior to joining Confederation, the effect of joining was to transfer any acquired incidents of that sovereignty to Canada.[21]

Thus the Court concluded, first, that the rights created by international law in the continental shelf off Newfoundland as incidents of external sovereignty belong exclusively to the Crown in right of Canada and, second, that Parliament has legislative jurisdiction in respect of these rights by virtue of its residual power under the peace, order and good government clause.[22]

The reasoning of the Court in this case amounts to a forceful rebuttal of the suggestion that the provinces have, or might in the future acquire, partial international

14. *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86, 51 N.R. 362, 5 D.L.R. [illegible]. Subsequent references are to 5 D.L.R. (4th).
15. *Id.*, at 398-401, 419.
16. *Id.*, at 397-401.
17. *Id.*, at 399.
18. *Id.*, at 410.
19. *Id.*, at 400-1.
20. *Id.*, at 401, 414.
21. *Id.*, at 410.
22. *Id.*, at 419.

personality and a concomitant right to negotiate and ratify treaties. Even if the international community were prepared to grant the provinces a limited capacity to negotiate and ratify treaties they would be constitutionally incapable of either accepting or exercising that power.

The implication of the *Newfoundland Reference* is that the power to conduct foreign affairs, including treaty-making, vests exclusively in the Crown in right of Canada and that legislative authority, following the prerogative, vests in Parliament alone. This means that Parliament could pass legislation in which it claims for itself the power to ratify some or all treaties, but in the absence of such legislation the federal government has the capacity to bind Canada or a part of Canada by treaty on any subject whatsoever without having to obtain the advice or consent of either Parliament or the provinces. Any sharing or division of this power between the federal government and the provinces is impossible because, as an incident of external sovereignty, treaty-making requires extraterritorial competence and such competence is lacking in the provinces.

Treaty Implementation in Canada - The Labour Conventions Case

Under Anglo-Canadian law treaties are not self-executing; that is, they do not automatically become part of the domestic law of the land. Some treaty obligations may be discharged by the executive through exercise of the prerogative power. However, where the performance of a treaty affects the private rights of citizens, involves the expenditure of money or requires the alteration of existing domestic law, a legislative act is necessary.[23] This causes little difficulty in the United Kingdom with its single legislature and system of responsible government. It causes considerable difficulty in Canada where there are eleven legislative wills.

At the time of Confederation the problem of treaty implementation was anticipated and provided for in Section 132 of the *Constitution Act, 1867* which confers on the government and Parliament of Canada all powers necessary for the due performance of obligations imposed on Canada or a province by Imperial treaty. However, since it was not contemplated in 1867 that Canada would some day achieve capacity to make treaties for itself, no provision is made in the Act for the due performance of Canadian treaties.

This oversight was first brought to the attention of the Privy Council in the *Radio Communications* case.[24]

The Board there took it for granted that the performance of obligations incurred pursuant to Canadian treaties constituted a distinct legislative subject or matter; and since this matter did not come within any of the headings of legislative power assigned to the provinces under section 92 of the Act, it followed that competence to implement treaties must fall within Parliament's residual power to legislate for the peace, order and good government of Canada.[25] In the view of the Board this result was perfectly sensible. As Viscount Dunedin explained, once Canada became a signatory to a treaty or convention, persons in Canada who are capable of breaching the convention must be kept in order: "to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada."[26]

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23. See Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975), 2 *Dal. L.J.* 307, at 307-312.
24. *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304.
25. *Id.*, at 312-13.
26. *Ibid.*

The *Radio Communications* case was decided in 1932. A few years later in the *Labour Conventions* case[27] the Privy Council was given a chance to reconsider the matter and this time it took a different approach. The Board refused to treat the implementation of treaties as a distinct legislative matter over which Parliament might claim complete and exclusive control. Rather it took the view that there is nothing special about legislation enacted to perform a treaty and that legislative jurisdiction for this purpose must therefore be determined in the ordinary way. Thus, if the matter dealt with in a treaty falls within provincial jurisdiction under Section 92, the decision whether or not to pass implementing legislation in performance of the treaty obligation belongs to the provincial legislatures alone.[28]

The policy consideration underlying this change of heart is clearly spelled out in the judgment. The Board noted that the division of legislative powers set out in the *Constitution Act, 1867* is an essential condition of the pact under which the provinces and in particular the Province of Quebec entered Confederation. If a full treaty implementation power were vested in Parliament, it would be possible for the federal government to narrow the scope of provincial powers under section 92 through the simple expediency of contracting international obligations in relevant areas.[29] For this reason, even assuming that the power to ratify treaties vested exclusively in the federal executive, the power to implement them is divided: "no further legislative competence [was] obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions."[30]

Rewriting the Labour Conventions Case

Since 1937 when the *Labour Conventions* case was decided, the Supreme Court of Canada has indicated on a number of occasions that it is prepared to reconsider the wisdom of the Board's decision in that case.[31] Implementation of an international trade agreement could well afford the opportunity the Court has been seeking. Such an agreement would cover matters ordinarily within provincial jurisdiction, yet as part and parcel of a treaty respecting trade these matters would have a national or pan-Canadian significance that would have to be addressed.

The federal argument in favour of overruling the *Labour Conventions* case and restoring full treaty implementation power to the federal Parliament need not be made of straw. For one thing if Canada is to be an effective player in the international arena, securing benefits for itself and contributing to the development of international peace and prosperity, it must be able not only to ratify those treaties it thinks appropriate but also to perform them in full. No one wants to do business with a party which cannot be relied on to keep its word. Moreover if Canada is to function domestically as a nation, the pan-Canadian interest at stake in the performance of Canadian treaties must not be made subject to the parochial interests of particular provinces. Part of what it means to be a nation is that the welfare of the whole must prevail over the welfare of the part. Finally it may be relevant to note that under the constitutions of both Australia and the United States the power to implement treaties is vested in federal institutions.[32]

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27 *A.G. Can. v. A.G. Ont.*, [1937] A.C. 326.
28 *Id.*, at 351-52.
29 *Ibid.*
30 *Id.*, at 352.
31 See *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292 at 303; *Francis v. The Queen*, [1956] S.C.R. 618 at 621; *Reference re Offshore Mineral Rights of B.C.*, [1967] S.C.R. 792 at 815-17; *MacDonald v. Vapour Canada*, [1977] 2 S.C.R. 134 at 162-172; *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at 134-35.
32 Section 51 (xxix) of the *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., c. 12, confers on the Commonwealth Parliament jurisdiction over external affairs. As interpreted by the High Court of Australia,

Although the federal argument may appeal to some members of the Court, it is almost certain to fail. The practical consequences of vesting Parliament with a plenary jurisdiction to implement treaties would be considered unacceptable. In the years since Canada acquired international personality, a growing interaction and interdependence among nations has led the international community increasingly to concern itself with matters which used to be regarded as wholly domestic in character. There is today no area of jurisdiction which may not become the subject of an international agreement. If treaty implementation were to be treated as a federal head of power, the effect on provincial jurisdiction and on federal-provincial relations generally would be considerable. Not only might the scope of provincial powers be reduced, but more importantly the decision to shrink or expand these powers would rest with the federal executive. In practice, through the exercise of its prerogative to ratify or renounce treaties, the Crown in right of Canada would be able to control the scope of provincial legislative jurisdiction from time to time in a wide variety of areas. Such an arrangement would, of course, be contrary to first principle. Neither level of government can be permitted a unilateral power to amend the constitutional distribution of powers.

For these reasons, rather than seek a wholesale repudiation of the *Labour Conventions* case, the federal government would be better advised to suggest a modification or attenuation of its basic approach. As Professor Lederman points out, the worst feature of the case from the federal point of view is the implication that in assessing the validity of implementing legislation the court is to ignore the fact that the legislation has been enacted to perform a Canadian treaty obligation.[33] It should be possible to abandon this extreme position without undermining provincial autonomy. What Professor Lederman proposes is a compromise under which provincial interests would be protected while at the same time permitting Canada to operate with greater effectiveness and authority in the international arena.[34] To achieve this compromise it would be necessary to recognize the existence of a federal power to implement treaties but subject to a limitation that reserves to the provinces a core of untouchable jurisdiction.[34a]

In the *Radio Communication* case the power to implement Canadian treaties was treated as part of the federal residue under the peace order and good government clause.[35] Professor Lederman does not embrace this position. He relies rather on Parliament's "general power" under the peace, order and good government clause as explained by Viscount Simon in the *Canada Temperance* case: where a matter transcends local and provincial interests and is by its inherent nature of concern to the nation as a whole, then it falls within federal competence as a matter affecting the peace, order and good government of Canada.[36] Lederman argues that the ratification of a Canadian treaty respecting a particular matter *prima facie* clothes that matter with national importance sufficient to sustain jurisdiction under the general power. However, if this matter is one that ordinarily falls within provincial jurisdiction and is

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this jurisdiction includes the power to implement all *bona fide* treaties and conventions to which Australia may become a party: see *The Commonwealth v. Tasmania* (1983), 57 A.L.J.R. 450.
In the United States the power to make treaties is vested in the President by and with the advice and consent of the Senate: see *The Constitution of the United States*, Article II, section 2. Self-executing treaties, by virtue of the Supremacy Clause, automatically become the law of the land: see Article VI, clause 2. Treaties that are not self-executing are implemented by Congress under Article I, section 8 which gives Congress the power to make all laws necessary and proper to give efficacy to any stipulation in a treaty.

33. See W.R. Lederman, "Legislative Power to Implement Treaty Obligations in Canada" in *Continuing Canadian Constitutional Dilemmas* (1981), 351 at 355.
34. *Id.*, at 357.
34a. *Ibid.*
35. See *supra*, note 24.
36. See *A.G. Ont. v. Canada Temperance Federation*, [1946] A.C. 193, at 205.

also "something quite fundamental for provincial autonomy,"[37] then the treaty may not be implemented under the general power. In such a case the national dimension arising out of the treaty must yield to the higher value of preserving the federal balance in Canada.[37a]

The basis suggested by Professor Lederman for limiting federal power requires the courts to distinguish between two classes of provincial matters: those that are fundamental and those that are not. While admitting that this is a difficult distinction, Lederman points to the many areas in our federal system where the courts are called on to make "like distinctions and compromises."[38]

One is hesitant to criticize the suggestions of a scholar whose opinions have commanded wide respect in the Supreme Court of Canada. However, it appears that the proposed distinction between fundamental and non-fundamental provincial matters is quite different from the constitutional distinctions and compromises Canadian courts are accustomed to making. The problem with it is that it lacks any theoretical or formal underpinning in existing constitutional law. In recent years attention has focused on the significance of the political preferences of judges when exercising their powers of review.[38a] There are competing models of federalism and competing views on the proper role of government in society. A judge's preference in these matters naturally informs his understanding of constitutional language and his application of constitutional doctrine. Arguably this is proper; in any case it appears to be unavoidable. My point is that the formal framework provided by constitutional language and doctrine is an important part of the process of judicial review. This framework inhibits the free indulgence of mere preference and provides a constitutional vocabulary in which the judicial result can be expressed and justified. The distinction called for by Lederman, having no basis in any language of the *Constitution Act, 1867* nor in any known constitutional doctrine, lacks underpinning. It also lacks context. The existing body of case law and academic writing has little to say on so novel a distinction. One fears that any conclusion reached by a court as to whether a given provincial matter is fundamental or not would necessarily be, and appear to be, the expression of mere personal preference. This renders the distinction unsuitable as a basis for limiting federal power.

The possibility of rewriting the *Labour Conventions* case has also been explored by Professor G. La Forest,[39] who now sits as a member of the Supreme Court of Canada. Professor La Forest (as he then was) does not call for the recognition of a distinct treaty implementation power. Federal enactments designed to perform treaty obligations would be tested for constitutional validity in the usual way. However, he does offer two suggestions either of which could, if developed, prove quite far reaching in effect.

First it is suggested that when assessing implementing legislation the courts should be prepared to recognize an international dimension in matters that normally fall within provincial jurisdiction. This international dimension properly lies outside the scope of provincial jurisdiction and should be dealt with by Parliament under one of the enumerated heads of section 91 where possible. Otherwise it comes within federal jurisdiction under Parliament's residual power.[39a] Consider, for example, the matter of a carrier's liability in tort or contract for the negligent transport of goods.

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37. *Supra*, note 33, at 358.
37a. *Id.* at 357-58.
38. *Ibid.*
38a. See, for example, Monahon, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984), 34 *U. of T. L.J.* 47.
39. See La Forest, "The Labour Conventions Case Revisited" (1974), 12 *Can. Y.B. Int. Law* 137.
39a. *Ibid.*, at 151.

Prima facie this subject is a provincial matter but it acquires a federal dimension when dealt with in the context of a treaty regulating the international transport of goods. The transborder or extraterritorial dimension of the activity or relationship thus serves as a hook for federal jurisdiction.[39b]

The second suggestion involves a variation on the ancillary powers doctrine. Under that doctrine a provision which would be *ultra vires* if enacted on its own may be found to be valid because it has been enacted as an integral part of an otherwise valid legislative scheme.[40] Professor La Forest notes that when the federal government negotiates a treaty, particularly a multilateral treaty, it must generally accept the resulting arrangement as a whole.[40a] For this reason, he suggests, the courts should be prepared to uphold provisions dealing with provincial matters if they are part of otherwise valid implementing legislation.[40b] The treaty itself may constitute or be evidence of an integrated scheme so that if the basic thrust of its subject matter falls within federal jurisdiction, that will suffice to sustain full federal implementation.

These propositions are variations on well established themes in Canadian constitutional law and one can readily imagine a court adopting one or the other to uphold federal legislation in a worthy case. They permit the courts to achieve the sort of compromise envisaged by Professor Lederman on a case by case basis without having to overrule the *Labour Conventions* case and this has obvious appeal for Canadian courts. In any event, and regardless of whether the views of Professor La Forest are accepted, the basic rule established in that case will likely be upheld. In Canada there is no such thing as a federal treaty-implementation power and the jurisdiction to implement treaties is divided between Parliament and the provincial legislatures in accordance with the ordinary division of powers.

Given this basic rule, if the federal government were to ratify a free trade agreement it would need provincial cooperation to carry out Canada's obligations in so far as they fell within the exclusive jurisdiction of the provinces. It is on this basis that the provincial claim to an "effective veto" rests.[40c] Whether the provincial claim is justified depends on the character of the obligations assumed by Canada and on the distribution of legislative authority under the Canadian Constitution.

The Scope of an International Free Trade Agreement

Any comprehensive liberalization of trade between Canada and its foreign trading partners in the course of the next few years is likely to involve not only the reduction of non-tariff barriers to trade in goods and commodities but also the reduction of barriers to the free flow of services and capital into Canada.[41] In the area of goods and commodities a free trade agreement would focus on such issues as discriminatory pricing, quotas, export subsidies and preferential procurement practices.[41a] What might be attempted in the area of services and investment is more difficult to predict.

There presently exist in Canada a number of statutes at both the federal and provincial levels that are designed to inhibit the free flow of capital and services into

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39b. *Ibid.*

40. See *Caloil v. A.G. Can.*, [1971] S.C.R. 543, [1971] W.W.R. 37, 20 D.L.R. (3d) 472.

40a. *Supra*, note 39, at 151.

40b. *Id.*, at 151-52.

40c. *Supra*, note 3.

41. See Finlayson and Thomas, *"The Elements of a Canada-United States Comprehensive Trade Agreement"*, forthcoming.

41a. See Morici, "Trends in U.S. Trade Policy and Non-Tariff Barriers" and Moroz, "Some Observations on Non-Tariff Barriers and their Use in Canada," in *Canada-United States Free Trade*, Royal Commission on the Economic Union and Development Prospects for Canada, Collected Research Studies, 1985.

the country. Apart from showcase legislation like FIRA[42] and the NEP,[43] there are provisions in a host of federal and provincial statutes making citizenship or residence or some variation thereof a prerequisite for holding an office, acquiring a benefit or carrying on a particular business or activity in the jurisdiction.[44] Many of the statutes regulating corporations, for example, contain provisions that require a certain percentage of the Board of Directors to be Canadian as defined in the legislation;[45] some require a certain percentage of the shareholders to be Canadian as well.[46] With respect to the ownership of property, the federal *Citizenship Act* expressly authorizes the provinces to impose restrictions on ownership by non-Canadians.[47] A number of provinces have accepted the implicit invitation. Thus, under Alberta's *Foreign Ownership of Land Regulations* non-Canadians as defined therein may acquire only a limited interest in certain categories of land in the province.[48]

Similarly, much of the legislation regulating the service industries in Canada contains restrictive provisions. In Ontario, one must be a Canadian citizen to hold a liquor license[49] or practice law;[50] one must be a resident of Ontario to carry on business as a collection agency[51] or an employment agency;[52] and one must have been trained in Ontario to be licensed as a dental technician.[53] In addition to legislative provisions of this sort, there is a range of governmental practices which favour local service industries at the expense of foreign competition[54]

Under a comprehensive free trade agreement Canada would undertake to eliminate or at least control a specified number of these non-tariff barriers to trade. The difficulty for the federal government in attempting to carry out such an undertaking lies in the fact that many of the offending barriers have been erected by the provinces in an apparently valid exercise of their legislative and executive powers. Clearly Parliament may order the demolition of federally erected barriers to trade. The challenge for Parliament is to find some basis on which it may dismantle those put in place by the provinces.

Jurisdiction Over Trade and Commerce

There is a range of matters over which Parliament has undoubted jurisdiction by virtue of the specific heads of power enumerated in section 91. For example, the entry of foreign banks into Canadian markets is clearly a matter for Parliament under section 91(15) respecting "Banking". Determining the duration of monopolies enjoyed by foreign patent holders in Canada could be dealt with pursuant to section 91(23) respecting "Copyrights." In addition a number of economically important industries and enterprises fall within federal jurisdiction through section 92(10)(a) respecting

42. *Foreign Investment Review Act*, S.C. 1973-74, c. 46.
43. The National Energy Program was introduced by the federal government to achieve increased Canadian participation in the oil and gas industries. This goal was to be achieved through the *Canada Oil and Gas Act*, S.C. 1980-81, c. 81; the *Petroleum Incentives Program Act*, S.C. 1980-81-82, c. 107, ss. 2-33; and the *Canadian Ownership and Control Determination Act*, S.C. 1980-81-82, c. 107, ss. 34-62.
44. For a survey of such legislation, see Hughes, *Foreign Investment Law in Canada* (1983).
45. See *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33, ss. 100(3), 110(2) at the federal level; *Ontario Business Corporations Act*, 1982, S.O. 1982, c. 4, s. 118(3) at the provincial level.
46. See *Ontario Energy Corporation Act*, R.S.O. 1980, c. 333, s. 13(2)(3).
47. *Citizenship Act*, S.C. 1974-75-76, c. 108, s. 33.
48. *Agricultural and Recreational Land Ownership Act*, R.S.A. 1980, c. A-9, Alta. Reg. 160/79, as am. 236/82.
49. *Liquor Licence Act*, R.S.O. 1980, c. 244, s. 6(1)(b).
50. *Law Society Act*, R.S.O. 1980, c. 233, s. 28(c).
51. *Collection Agencies Act*, R.S.O. 1980, c. 73, s. 10(1).
52. *Employment Agencies Act*, R.S.O. 1980, c. 136, s. 14(a), R.R.O. 1980, Reg. 280, s. 6(2).
53. *Dental Technicians Act*, R.S.O. 1980, c. 114, s. 3(1)(6), R.R.O. 1980, Reg. 237, s. 1(1)(c).
54. For further discussion of these and other non-tariff barriers to trade in Canada, see Stegemann, *Canadian Non-Tariff Barriers to Trade*, (1973) and *The Canadian Common Market: Interprovincial Trade and International Competitiveness*, Canada West Foundation, 1985.

interprovincial works and undertakings, through exercise of the declaratory power contained in section 92(10)(c) or through application of the peace, order and good government clause. Special cases aside, however, the chief source of jurisdiction for the implementation of free trade across Canadian borders should be the federal trade and commerce power.

Section 91(2) of the *Constitution Act, 1867* confers on Parliament "notwithstanding anything in this Act," jurisdiction over "The Regulation of Trade and Commerce." On the face of it this language is broad enough to embrace anything that is likely to appear in a free trade agreement between Canada and a foreign state. However, at an early stage in Canadian history the scope of the federal power was narrowed so as to exclude what might be called local trade or trade and commerce in the province. By the end of the 19th century it was well established that the provincial legislatures were competent to regulate local business and industry primarily by virtue of their jurisdiction over property and civil rights (S. 92(13)), but also through the licensing power (S. 92(9)) and the power in relation to matters of a merely local or private nature in the province (S. 92(16)).[55]

What was left to Parliament under the trade and commerce power is described in *Citizens Insurance Co. v. Parsons*:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.[56]

On the basis of this passage the federal trade and commerce power is generally understood to comprise two branches: one consisting of jurisdiction over international and interprovincial trade; the other - also called the general power - consisting of jurisdiction over economic matters affecting the nation as a whole.

Once again, on the face of it this scaled down version of the federal power is not so very narrow. As the American example shows, jurisdiction over transborder trade can prove an expansive jurisdiction indeed.[57] This potential has not been realized in Canada, largely because of the analysis adopted by the Privy Council under the leadership of Lords Watson and Haldane.[58] During its era of hegemony the Privy Council formulated a number of propositions which to some extent still govern judicial thinking about the regulation of trade and commerce in Canada.

In the first place, the Board placed great emphasis on the exclusive character of provincial jurisdiction over local trade. This meant, of course, that any federal incursion into the area, however well intentioned, must be *ultra vires.*[59]

Secondly, although it never said so, in practice the Board was willing to apply the first branch of *Parsons* respecting transborder trade only to trade in commodities.[59a]

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55. The key decision is *Citizens Insurance Co. v. Parsons* (1881), 7 A.C. 96, but see also *Hodge v. The Queen* (1883), 9 A.C. 117; *A.G. Ont. v. A.G. Can. (Voluntary Assignments)*, [1894] A.C. 189; *A.G. Ont. v. A.G. Can. (Liquor Licence Act)*, [1896] A.C. 348; *A.G. Can. v. A.G. Ont. (Law Professions)*, [1898] A.C. 247; *A.G. Man. v. Man. Licence Holders*, [1902] A.C. 73.
56. *Id.*, at 112-13.
57. The development of the federal commerce power in the United States is described in Nowak et al., *Constitutional Law* (2d ed. 1983), at 138-170.
58. Lord Watson delivered the judgment in the *Voluntary Assignment* case and the *Liquor Licence* case, *supra*, note 51. The key judgments of the Haldane period respecting trade and commerce are *A.G. Can. v. A.G. Alta. (Insurance Act)*, [1916] 1 A.C. 588; *Re Board of Commerce Act*, [1922] 1 A.C. 191; and *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396.
59. The insistence on mutually exclusive areas of competence was pushed to the greatest extremes in the marketing cases. See, for example, *A.G. B.C. v. A.G. Can. (Natural Products Marketing Act)*, [1937] A.C. 377 and *Canadian Federation of Agriculture v. A.G. Que (Margarine)*, [1951] A.C. 179.

59a. This fact is noted by Laskin C.J. in *A.G. Man. v. Man. Egg and Poultry Ass.*, [1971] S.C.R. 689, [1971] 4 W.W.R. 705, 19 D.L.R. (3d) 169, at 184. Subsequent references are to 19 D.L.R. (3d).

All other aspects of trade and commerce were presumed to be aspects of local trade unless they met the test for federal jurisdiction under the second branch of *Parsons* consisting of Parliament's power to regulate trade affecting the country as a whole.[60] However, the test for federal jurisdiction under this second branch of *Parsons* was almost never met. As applied by the Board, it allowed Parliament to regulate the economy in general, but it did not permit the regulation of particular trades or industries in the province - such as insurance[61] or beer[62] - nor particular aspects of the economy in general - such as labour relations.[63] In effect, Parliament had jurisdiction to cut down the forest provided it did so without touching any trees.

Finally, the scope of Parliament's jurisdiction over transborder trade in commodities was narrowly defined. To be valid federal legislation had to more or less capture the commodities in the very act of crossing a provincial border. Pre-border crossing transactions involving commodities bound for external markets were considered part of local trade.[64]

The effect was to deny any federal dimension to commercial transactions apart from those involving the transborder marketing of commodities. In particular, the transborder marketing of goods and services, which arguably should fall under the first branch of *Parsons*, has been regarded as primarily a provincial matter.

This restrictive reading of the federal trade and commerce power is an integral part of the "watertight compartment" theory of federalism devised by the Privy Council to preserve provincial autonomy under a constitution which, on its face, appeared to concentrate the lion's share of power at the centre.[65] Since becoming the final appellate court for Canada, the Supreme Court of Canada has moved away from the emphasis on discrete and mutually exclusive heads of power. This is apparent in its cultivation of the double aspect doctrine, which tends to turn exclusive areas of jurisdiction into concurrent ones,[66] and its revitalisation of the ancillary powers doctrine.[67] Nonetheless, the perceived need to preserve provincial autonomy by preserving the core jurisdiction of the provinces over property and civil rights remains a major concern of the Court. And an important part of this core is control over the local economy. This point is affirmed in two recent judgments of the Supreme Court of Canada where federal efforts to establish national grading and product standards were struck down as impermissible attempts to regulate local production and marketing.[68]

It is also important to notice that in practice economic regulation in Canada tends to go on at the provincial level whether it needs to or not. There are a number of areas where concurrent jurisdiction exists, but Parliament has made no effort to

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60. For the judgment that effectively establishes this unwritten rule, see *A.G. Can. v. A.G. Alta. (Insurance Act)*, *supra*, note 58.
61. *Ibid.*
62. See *A.G. Man. v. Man. Licence Holders Ass.*, *supra*, note 55.
63. See *Toronto Electric Commissioners v. Snider*, *supra*, note 58.
64. See *A.G. B.C. v. A.G. Can. (Natural Products Marketing Act)*, *supra*, note 59.
65. This expression was first used by Lord Atkin in the *Labour Conventions* case, *supra*, note 27, at 206, in referring to the need to preserve the exclusive character of provincial jurisdiction: "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartment which are an essential part of her original structure."
66. Under the double aspect doctrine, particular legislative subjects are found to have both provincial and federal aspects, so that either level of government may deal with them, each from its own perspective. For a recent application of the doctrine, see *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 44 N.R. 181, 138 D.L.R. (3d) 1.
67. The ancillary powers doctrine is explained *supra*, at note 40. For application to the federal trade and commerce power, see *Regina v. Klassen* (1959), 20 D.L.R. (2d) 406 (Man. C.A.) and *Caloil v. A.G. Can.*, *supra*, note 40.
68. See *Dominion Stores v. The Queen*, [1980] 1 S.C.R. 844, 50 C.C.C. (2d) 277, 30 N.R. 399, 106 D.L.R. (3d) 581 (grading) and *Labatt Breweries of Can. v. A.G. Can.*, [1980] 1 S.C.R. 914, 9 B.L.R. 181, 30 N.R. 496, 110 D.L.R. (3d) 594 (product standards). Subsequent references are to 110 D.L.R. (3d).

keep up its end of things. Securities regulation is perhaps the best example of this phenomenon. Notwithstanding extensive transborder trade in securities in Canada, regulation is done for the most part at the provincial level.[69] More striking still, in many areas where federal jurisdiction is exclusive, such as interprovincial trucking or the regulation of inland Canadian fisheries, Parliament avoids the burdens of jurisdiction by delegating its powers to provincial officials and administrative boards.[70] One consequence of this practice is that the administrative machinery and expertise needed for effective government gets concentrated at the provincial level so that for practical reasons it becomes difficult for Parliament to enter the field.[71] With the passage of time, moreover, one tends to forget that provincial control is dependent on federal sufferance. It is easy to take the provincial role for granted and this in turn shapes our assumptions about what is normal or appropriate in terms of the federal balance in Canada.

A good illustration of the point is the way in which the provincial monopoljes over the sale of alcoholic beverages operate in Canada. In Ontario, for example, a person who wishes to sell beer must be licensed by the province[72] and he must purchase all his supplies from the Liquor Control Board of Ontario.[72a] This Board is the only entity in Ontario with legal authority to import beer into the province[73] and it generally chooses not to import from other provinces.[74] The result is Ontario's contribution to the balkanization of beer production in Canada. What could rationally have operated as a transborder industry operates in practice as a series of local industries under provincial control.

It is arguable that this balkanization could not have been achieved and could not be sustained without subsection 3(1) of the *Importation of Intoxicating Liquors Act*[75] which confers on provincial monopolies the sole right to import beer into the province. This is a federal, not a provincial enactment. It was first passed by Parliament in 1928 and has remained on the books ever since, effectively delegating to the provinces control over the importation of liquor and helping to create a perception of provincial autonomy in this area.

The provincial claim to wield an effective veto over the implementation of an international free trade agreement is thus based on a number of considerations: the fact that many non-tariff barriers to trade have been put in place by the provinces, the historical tendency of the courts to favour a narrow reading of the trade and commerce power and the federal practice of delegating regulatory authority to the provinces. This combination of fact, law and practice undoubtedly helps the provinces, but one should not be too quick to dismiss the potential which inheres in the federal trade and commerce power. Although the judgments of the Supreme Court of Canada respecting this power have been marred by inconsistency and lack of

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69. See *Smith v. The Queen*, [1960] S.C.R. 776, 33 C.R. 318, 25 D.L.R. (2d) 225, 128 C.C.C. 145; and *Multiple Access v. McCutcheon*, *supra*, note 66. See also Anisman and Hogg, *Proposals for a Securities Market Law for Canada*, Vol. 3 (1979).
70. With respect to trucking, see the *Motor Vehicle Transport Act*, R.S.C. 1970, c. M-14, s. 3. With respect to fisheries, see the *Fisheries Act*, R.S.C. 1970, c. F-14, s. 34, *Ontario Fisheries Regulations*, C.R.C. 1978, c. 849, s. 29(4).
71. For an interesting case study see Schultz, "Intergovernmental cooperation, regulation agencies and transportation regulation in Canada: the case of Part III of the National Transportation Act" (1976), 19 *Can. Pub. Admin.* 183.
72. *Liquor Licence Act*, R.S.O. 1980, c. 244, s. 4(1).
72a. *Liquor Licence Act*, R.S.O. 1980, c. 244, s. 39, R.R.O. 1908, Reg. 581, p. 8(1)(b).
73. See the *Importation of Intoxicating Liquors Act*, R.S.C. 1970, c. I-4, s. 3(1).
74. See *Re Bajor and the Queen* (1985), 50 O.R. (2d) 705 (H.C.J.). See also Stegemann, *supra*, note 54 and Bernier, "Le GATT et le problème du commerce d'état dans les pays à économie de marché: Le cas des monopoles provinciaux des alcools au Canada" (1975), 13 *Can. Yb. Int. L.* 98.
75. *Importation of Intoxicating Liquors Act*, R.S.C. 1970, c. I-4, s. 3(1).

direction, the one thing the Court has done is to keep its options open."[76] On the basis of existing authority it is possible in my view for the Court to uphold federal legislation designed to implement an international free trade agreement and to strike down provincial initiatives inconsistent with or unduly disruptive of the federal scheme.

One of the peculiarities of a free trade agreement is that what the parties effectively agree to is *non*-interference or *non*-action. Existing barriers must be removed, which is activity of a sort, but once the barriers are down the basic undertaking on each side is to do nothing. It thus becomes pertinent to ask not only to what extent Parliament is free to act, but also to what extent the provinces may be prevented from acting.

In the discussion which follows these questions will be examined under three headings: barriers to the free flow of goods and commodities; barriers to the free flow of services and capital; and controlling provincial governments.

Barriers to the Free Flow of Goods and Commodities

A barrier to free trade is a measure that is designed to protect domestic industry by distorting some aspect of the competition between the domestic players to be protected and their foreign competitors. In the case of imports a barrier is any measure that hinders the entry of goods or commodities into the jurisdiction or which seeks to make the imported product less competitive in the domestic market. In the case of exports barriers include measures such as export subsidies which facilitate rather than hinder the flow of products across the border by artificially enhancing their ability to compete in the foreign market.[77]

Under Canadian constitutional law the erection of barriers to trade in goods and commodities, along with the demolition of such barriers, is in my view exclusively a federal matter; it lies at the heart of Parliament's jurisdiction over transborder trade. Another way of putting this is to say that the level of protection from foreign competition to be enjoyed by local industry at any given time is for Parliament alone to decide. Considerable support for this analysis is found in the case law of the Supreme Court of Canada over the past fifteen years.

With respect to exports, a number of cases establish the proposition that jurisdiction to regulate the flow of commodities to the export market is exclusively federal.[78] For this reason provincial legislation fixing the export price of commodities produced in the province was struck down in both the *CIGOL* and *Central Potash* cases.[79] In the *CIGOL* case the province was merely seeking to capture additional revenues and it is arguable that its legislation was not properly characterized as a price-fixing scheme.[80] In the *Potash* case, however, such a characterization was appropriate. The legislation at issue was designed to protect Saskatchewan's share of the American potash market by controlling the price and quantity of the exported product.[81]

Where provincial legislation is aimed at control of the export market, it is *ultra vires*. However, where it is aimed at matters in the province and only incidentally affects

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76. For discussion see MacPherson, "Economic Regulation and The British North America Act: Labatt Breweries and other Constitutional Imbroglios" (1980) 5 *Can. Bus. L.J.* 172.
77. See Moroz, *supra*, note 41a, at 200-203.
78. See *Canadian Industrial Gas and Oil v. Government of Sask.*, [1978] 2 S.C.R. 545, [1977] 6 W.W.R. 607, 18 N.R. 107, 80 D.L.R. (3d) 449 and *Central Canada Potash v. Government of Sask.*, [1979] 1 S.C.R. 42, [1978] 6 W.W.R. 400, 6 C.C.L.T. 265, 23 N.R. 481, 88 D.L.R. (3d) 609. Subsequent references are to 88 D.L.R. (3d).
79. *Ibid.*
80. The Court's judgment in this case has been widely criticized. See in particular Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980), 18 *Osgoode Hall L.J.* 1.
81. See *Central Canada Potash v. Government of Sask.*, *supra*, note 78, at 628-29.

the export market, it is perfectly valid. In the *Carnation Milk* case[82] legislation which authorized a provincial marketing board to fix the price of raw milk was upheld even though the price of raw milk effectively controlled the price of processed milk, most of which was exported from the province. The Court acknowledged the impact of the Board's regulation on Carnation's export trade. However, as stated by Martland J., "the fact of such impact . . . may be relevant in determining [the] true aim and purpose, but it is not conclusive."[83] The conclusive test is whether the legislation "*aims* at 'regulation of trade in matters of interprovincial concern'."[84]

The difference between valid and invalid legislation thus turns on legislative aim or intent, but it is not entirely clear what a province must not seek to accomplish. In my view, the touchstone of invalidity is the intention by a province to distort the competitive performance of its products in the export market. It is this effect or result that may not be deliberately sought by a province. The legislation in the *Potash* case was invalid because it was enacted to implement an informal cartel arrangement between Saskatchewan and an American state and its target was the foreign market. The legislation in *Carnation* was valid because its target was the local market. It did not operate nor was it intended to operate as a barrier to transborder trade.

With respect to imports the case law is somewhat stronger and more pointed. In two recent cases, the *Manitoba Egg* case[85] and *Burns Foods*,[86] provincial marketing schemes were struck down because they applied to imports as well as to the locally produced product. Provincial jurisdiction was denied even though once the products were imported the specific transactions to be regulated might take place entirely in the province. The reasons for this result are expressed with particular clarity by the Court in the *Manitoba Egg* case. A province may not use its jurisdiction over marketing in the province to protect local producers at the expense of foreign competition. Martland J. makes the point in the following way:

> It is my opinion that the Plan now in issue not only affects interprovincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between Provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.[87]

Laskin C.J. in a concurring judgment is equally clear:

> The existence of egg marketing schemes in more than one Province, with objectives similar to the proposed Manitoba scheme, makes it clear that interprovincial trade in eggs is being struck at by the provincial barriers to their movement into various provincial markets. If it be thought necessary or desirable to arrest such movement at any provincial border then the aid of the Parliament of Canada must be sought . . .[88]

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82. *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238.
83. *Id.*, at 14.
84. *Ibid.*
85. *Supra*, note 59a.
86. *Burns Foods v. A.G. Man.*, [1975] 1 S.C.R. 494, [1974] 2 W.W.R. 537, 1 N.R. 147, 40 D.L.R. (3d) 731. Subsequent references are to 40 D.L.R. (3d). I have ignored an earlier case dealing with imports to the province, namely *Home Oil Distributors Ltd. v. A.G. B.C.*, [1940] S.C.R. 444, [1940] 2 D.L.R. 609. The provincial legislation at issue in that case authorized a local board to fix the prices of all petroleum products sold in the province, including imports. There was evidence to suggest that the legislation was intended to operate as an anti-dumping scheme and that most certainly was its effect. This legislation was upheld on the basis of a casual remark of Lord Atkin in *Shannon v. Lower Mainland Dairy Products Bd.*, [1938] A.C. 708. In my view the *Home Oil* case was wrongly decided and is no longer good law. Although it has not been expressly overruled, its holding is inconsistent with the *Manitoba Egg* case and *Burns Foods*. The efforts of some members of the Court to reconcile these cases are not persuasive: see the *Manitoba Egg* case, per Laskin, C.J., *supra*, note 59a, at 185-87 and *Burns Foods*, per Pigeon, J., at 737-38.
87. *Supra*, note 59a, at 179.
88. *Id.*, at 190.

These cases strongly suggest that legislation enacted for the purpose of distorting the free flow of products across provincial borders is *ultra vires* the province. If trade barriers are to exist, it is for Parliament to put them in place. These cases also suggest that when it comes to determining the true purpose of legislation, the courts may and should look to actual effects.[89] Where a provincial enactment in fact operates as a barrier to trade, the court should be prepared to draw the inference that such an effect was intended. In such a case the evidentiary burden should then shift to the province to rebut this inference, if it can, by demonstrating that it had some purpose other than economic protectionism in mind. If the province can show that its legislation is intended to serve a legitimate, non-protectionist interest and if it can show a rational connection between the legislation and this interest, then the enactment should be upheld. This is the approach recommended by Laskin C.J. in the *Manitoba Egg* case.[90] In my view, it is the only approach that does justice to the competing interests involved - the federal interest in regulating the level of economic protectionism in Canada, and the provincial interest in such matters as local health, education and consumer protection.

Barriers to the Free Flow of Services and Capital

The line of cases referred to above deals exclusively with the flow of commodities over provincial borders. While the reasoning in these cases should apply as well to the transborder flow of goods, it probably would not apply to the transborder flow of services and capital. Federal jurisdiction in these areas must rely on the second branch of the trade and commerce power, the so-called general power.

Parliament's power to legislate respecting the economy as a whole, though frequently mentioned, has only rarely served to sustain a federal enactment.[91] However, it has recently received a new lease on life in the concurring judgment of Dickson J. (as he then was) in the *CN Transportation* case,[92] where an issue was raised concerning prosecutorial authority in respect of a conspiracy to prevent or unduly lessen competition in interprovincial transportation of articles contrary to the *Combines Investigation Act*.[92a] This judgment is important not only because it relies on the general power as a source of federal jurisdiction but also because it offers a fresh formulation and a reasonably specific set of criteria to apply in testing validity under the power.

The key to the judgment is the recognition by Dickson J. that Canada has a national economy capable of functioning as an integrated unit and that this unit is a suitable object of federal regulation.

> What is at issue is general legislation aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. Such legislation is qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination.[93]

The criteria for testing validity include the existence of a national regulatory

89. See *supra*, note 83. This point was stressed by the Court in the *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 37 N.R. 158, 123 D.L.R. (3d) 554, per Dickson, J. at 721 of [1981] 1 S.C.R.: "In my view a Court may, in a proper case, require to be informed as to what the effect of the legislation will be."
90. See *supra*, note 59a, at 189-90.
91. It was relied on in *John Deere v. Wharton*, [1915] A.C. 330, to sustain federal legislation respecting the incorporation of companies and in *A.-G. Ont. v. A.-G. Can. Standard Trade Mark*, [1937] A.C. 405, to sustain federal legislation establishing a national trade mark.
92. *A.G. Can. v. Canadian National Transportation*, [1983] 2 S.C.R. 206, [1984] 1 W.W.R. 193, 28 Alta. L.R. (2d) 97, 49 N.R. 241, 3 D.L.R. (4th) 16. Subsequent references are to 49 N.R.
92a. *The Combines Investigation Act*, R.S.C. 1970, c. c-23.
93. *Supra*, note 92, at 276.

scheme, the creation of a national supervisory or administrative agency and a concern with trade in general as opposed to a particular industry or business.[94] They also include the preferred test of Dickson J.:

> To this list I would add what to my mind would be even stronger indications of valid general regulation of trade and commerce, namely (i) that the provinces jointly or severally would be constitutionally incapable of passing such an enactment and (ii) that failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.[95]

This test is nearly identical to that formulated by the Supreme Court of Canada to determine whether federal legislation is valid under Parliament's general power to legislate for the peace, order and good government of Canada. Legislation may be upheld on this basis only if there is a need for nation-wide regulation that cannot be satisfied through provincial action because "the failure of one province to cooperate would carry with it grave consequences for residents of other provinces."[96] Both tests reflect the fact that provincial interests are not always identical. Sometimes the best result for one province can only be secured at the expense of another. In such cases, if the issues at stake are important to the nation as a whole, regulation at the federal level may be appropriate.

The conclusion reached by Dickson J. in the *CN Transportation* case is of particular relevance to the question of jurisdiction over free trade. He writes:

> A scheme aimed at the regulation of competition is in my view an example of the genre of legislation that could not practically or constitutionally be enacted by a provincial government. Given the free flow of trade across provincial borders guaranteed by s. 121 of the *Constitution Act, 1867* Canada is, for economic purposes, a single huge marketplace. If competition is to be regulated at all it must be regulated federally.[97]

On this basis Dickson J. was willing to uphold a key provision of the federal *Combines Investigations Act*.[98] His reasoning should apply with equal force to legislation designed to dismantle barriers to the entry of services and capital into Canada. In each case the regulation is designed to secure a particular level of free competition in Canada's "single huge marketplace."

Together the two branches of section 91(2) of the *Constitution Act, 1867* appear to confer on Parliament jurisdiction over the protection of the Canadian economy from foreign competition. This means that federal legislation enacted for the purpose of removing or reducing barriers to trade so as to permit freer access to the Canadian market place should be valid. Moreover, where legislation of this sort is enacted to carry out Canada's obligations under an international trade agreement, the case for federal jurisdiction should be even stronger.

In the first place, a free trade treaty should add to the element of provincial interdependence emphasized by Dickson J. in the *CN Transportation* case.[99] Once such a treaty if ratified, the failure of one or more provinces to cooperate would almost certainly provoke retaliation from the other parties and in the case of a bilateral treaty the entire agreement could be put in jeopardy. In either case other provinces or parts of the country would be exposed to economic loss. This problem arises most particularly in the context of a free trade agreement because the costs

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94. *Id.*, at 277.
95. *Ibid.*
96. This test was first formulated by Professor Hogg in *Constitutional Law of Canada* (1977) at 261. It has since been taken over by the Supreme Court of Canada: see *Labatt Breweries*, *supra*, note 68, at 627 and *Regina v. Wetmore* [1983] 2 S.C.R. 284, [1984] 1 W.W.R. 577, 49 N.R. 286, at 293 of 49 N.R.
97. *Supra*, note 92, at 283.
98. *Combines Investigation Act*, R.S.C. 1970, c. C-23.
99. See *supra*, note 95.

and benefits of freer trade are not likely to be distributed uniformly among the provinces.

In the second place, the existence of a treaty underlines the extraterritorial dimension of free trade across Canadian borders. This dimension arises because the effects of barriers to trade, if they are at all successful, are felt in other jurisdictions. The creation and destruction of such barriers is thus an aspect of Canada's foreign relations and these are properly dealt with at the federal level.[99a]

Finally, it would appear that the implementation of international trade agreements is precisely what the Privy Council had in mind when in the *Parsons* case it described the federal trade and commerce power as including "political arrangements in regard to trade with foreign governments, requiring the sanction of parliament."[100] This language suggests that section 91(2) confers on Parliament a limited treaty-implementation power consisting of the power to enact whatever legislation might be needed to give effect to treaties in respect of trade.

No doubt there are problems with this interpretation. For one thing the *obiter* remarks of Sir Montague Smith, who on this occasion spoke for the Board, cannot be substituted for the words of the *Constitution Act, 1867* which does not refer to treaties in section 91(2). Furthermore, these remarks were made before Canada acquired independence, so that in the ordinary course of events treaties in respect of trade would have been negotiated by the Imperial government and implemented by Parliament. Nonetheless, the specific reference to "political arrangements in regard to trade with foreign governments" should serve as a fortifying element in the argument to uphold federal treaty implementing legislation.

Controlling the Provincial Governments

The final issue to be addressed in this paper is the extent to which the provinces might avoid the constitutional limitations discussed above by relying on their executive powers, in particular the power to dispose of property belonging to the Crown in right of the province and the power to spend money forming part of the consolidated revenue fund. If the provinces enact legislation that erects a barrier to trade, the offending provisions may be held *ultra vires* or inoperative.[101] The question here is whether the provinces can be stopped from using protectionist measures when they enter the market place not as legislators but as traders and spenders.

It is well established that when the Crown in right of a province disposes of its own property, it is not bound by the ordinary division of powers set out in sections 91 and 92 of the *Constitution Act, 1867*. This is so even where the power is exercised by or pursuant to statute. In the *Smylie* case,[102] for example, the plaintiff complained of provincial legislation that introduced a manufacturing condition into its licence to cut timber on Crown land. Pursuant to this condition, all pine trees taken under the licence had to be manufactured into sawn lumber in Canada. This measure was clearly designed to protect domestic industry by excluding foreign competitors; it is an early example of the buy-Canadian or buy-provincial clauses that are frequently

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99a. See *supra*, note 18.

100. *Supra*, note 55, at 112.

101. The cases establish that federal jurisdiction over transborder trade is exclusive so that provincial legislation in relation to such trade is *ultra vires*; see authorities cited *supra*, notes 78 and 85-86. Federal jurisdiction over the economy in general is concurrent, however, so that provincial legislation is valid and will be rendered inoperative only in the event of operational conflict with a valid federal statute: see *supra*, note 66.

102. Smylie v. The Queen (1900), 27 O.A.R. 172 (C.A.).

introduced into government contracts in Canada.[103] The Court in *Smylie* acknowledged that the manufacturing clause had to do with trade and commerce and hinted that an attempt to legislate such a condition with respect to lumber not owned by the province might be *ultra vires*.[104] However, with respect to its own property the province was held free to do "what any . . . proprietor might do, when proposing to dispose of his property, viz., attach to the contract a condition not impossible of performance, or unlawful *per se*, or prohibited by any existing law."[105]

Thus, the Court here affirmed the additional scope enjoyed by the province when acting as owner: it is not bound by the division of powers set out in sections 91 and 92 and may therefore meddle in matters within the exclusive legislative jurisdiction of Parliament. However, the province *is* bound by existing law. Specifically it is bound by any federal statute that is validly enacted and made expressly applicable to the provincial Crown.[106]

The law respecting the government's power to spend is rather more obscure. Strangely enough, the nature and scope of this power have not yet been explored by the courts in a definitive way. In the *Unemployment Insurance* case the Privy Council suggested that the federal spending power is limited to strictly federal objects or purposes:

> . . . assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*.[107]

This was not the view taken in the Supreme Court of Canada. It affirmed Parliament's power to grant sums of money to or enter contracts with individuals or organizations on whatever terms Parliament thinks fit.[108] Exercise of the spending power differs from regulation, the Court explained, in that the proposed recipient of government money is free to decline. He is not obliged to enter the contract or accept the gift.[109]

The position of the Supreme Court of Canada on this issue is the one that is generally preferred.[110] In practice both levels of government spend their money freely, without regard to the division of powers. On the rare occasions that provincial spending decisions have been challenged before the courts, they have uniformly been upheld.[111] The better view, it appears, is that the province's spending power is as unfettered in scope as its power to dispose of Crown property.

The more difficult question is whether this power is subject to valid federal law. Can a provincial legislature be enjoined by Parliament from spending its own tax revenues as it thinks best? In my view the answer to this question must be yes. Although there are technical grounds on which the spending power may be distinguished from the power to dispose of Crown property,[112] it is difficult to see any basis in

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103. See *The Canadian Common Market: Interprovincial Trade and International Competitiveness*, *supra*, note 54, at 18-20.
104. See *supra*, note 102, at 179-80, 192.
105. *Id.*, at 192.
106. See *A.G. B.C. v. A.G. Can. (Employment of Japanese)*, [1924] A.C. 203; *A.G. Que v. Nipissing Central Ry.*, [1926] A.C. 715. For more recent authority see *The Queen v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, 2 Alta. L.R. (2d) 72, 14 N.R. 21, 75 D.L.R. (3d) 257: "It is, of course, open to the federal Parliament to embrace the provincial Crown in its competent legislation if it chooses to do so" per Laskin C.J., at 265 of 75 D.L.R. (3d).
107. *A.G. Can. v. A.G. Ont. (Employment Insurance)*, [1937] A.C. 355, at 366-67.
108. *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427, at 457.
109. *Id.*, at 454-55, 457.
110. See Scott, "The Constitutional Background of Taxation Agreements" (1955), 2 *McGill L.J.* 1; La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (2d ed. 1981), at 45-51; Driedger, "The Spending Power" (1981), 7 *Queen's L.J.* 124.
111. See *Dow v. Black* (1875), 6 P.C. 272; *McMillan v. City of Winnipeg*, [1919] 1 W.W.R. 591, 45 D.L.R. 351; *Dunbar v. A.G. Sask.* (1984), 33 Sask. R. 193, 11 D.L.R. (4th) 374 (Q.B.).
112. The power to dispose of Crown property is a prerogative power whereas the spending power is not.

principle or policy for treating them differently. In either case Parliament's jurisdiction to regulate within its areas of competence under sections 91 and 92 remains plenary. When a provincial government enters a contract or makes a gift, it is exercising the ordinary powers of a legal person as opposed to the unique powers of a legislature. Acting in this capacity, as a legal person, a provincial government should enjoy the same freedom as anyone else in Canada, but like everyone else in Canada its freedom is liable to be limited by duly enacted law.[113]

Conclusion

By way of conclusion, let us suppose the year is 1990 and Canada and the United States have succeeded in negotiating a comprehensive free trade agreement. It eliminates most tariffs and quotas, provides a uniform code for imposing countervailing duties and deals with a wide variety of specific trade issues.

Let us further suppose that pursuant to this agreement, Canada is obliged to eliminate preferential procurement clauses from Canadian contracts in both the public and private sectors. As part of its implementing package, Parliament enacts a provision which stipulates that no person in Canada including the Crown in right of a province may enter a contract which contains a preferential procurement clause. If the analysis offered in this paper is correct, the provision in question should be upheld as valid federal legislation and it should be binding on provincial governments and their agencies.

The provision should be upheld, even though it deals in part with matters of property and civil rights in the province, because it is designed to reduce a barrier to free trade with a foreign country. It is legislation in relation to the level of protection to be afforded Canadians from competition with foreign industry and services. As such it is part of Parliament's exclusive jurisdiction over international trade and commerce.

In the alternative, the provision should be upheld under Parliament's general power because it is part of a scheme designed to produce benefits for the Canadian economy as a whole and the provinces acting alone would be incapable of securing these benefits. The provision in question does not single out a particular business or trade but rather seeks to secure competitive conditions throughout the Canadian economy generally. Although one cannot say that the provinces would be constitutionally incapable of enacting a similar provision, one can say, with considerable emphasis, that the failure to include one or more provinces would jeopardize the successful operation of the scheme in other parts of the country.

Finally, the provision should be upheld under the ancillary powers doctrine because it is part of a scheme designed to implement a treaty respecting international trade. International trade on the whole is a federal matter and the provision in question is an essential feature of the implementing scheme.

If the analysis offered in this paper is correct, it does not prove that Parliament has complete jurisdiction to implement free trade. It suggests rather that the Supreme Court of Canada has the tools it needs to uphold a strong federal initiative in the area within the existing framework of Canadian constitutional law. Whether the Court has the will or desire to use those tools in the manner suggested is a distinct question and one which depends ultimately on the political vision and values of the decision-makers.

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113. For a contrary view, see Swinton, "Federalism and Provincial Government Immunity" (1979), 29 *U. of T. L.J.* 1.

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A.H. Benson

Farm ministers riled

Beef, sheep, hog subsidies vary sharply, controversial study shows

By Jim Romahn
Record staff

A study of subsidies for beef, sheep and hog farmers confirms there are big differences among the Canadian provinces.

For example, the federal and provincial subsidies for hog farmers for the five fiscal years between 1981 and 1986 ranged from a high of $48.88 per $100 of income for hog producers in Newfoundland to a low of $8.52 in Ontario, for sheep farmers from a high of $2,012.66 per head in Newfoundland to a low of $13.35 in Manitoba, for beef producers from a high of $44.62 per $100 of income for beef producers in Newfoundland to a low of $4.43 in Ontario.

The figures are so controversial that the provincial ministers of agriculture have been fighting about the study ever since it was begun by Prof. Larry Martin of the University of Guelph.

The report leaked recently to the Record is likely the copy the federal and provincial agriculture ministers reviewed in December.

Some provincial ministers challenged the figures and were granted time to take them home and check them against their records. The report was developed from data the federal and provincial governments provided Martin and his team of economists.

The politicians called for the study in the face of bitter complaints that differing degrees of provincial subsidies are balkanizing Canada's livestock industry, pitting one provincial treasury against another and making a mockery of market-place economics.

The first step towards putting farmers on a more equal footing was to persuade the federal government to limit its spending to national tripartite income stabilization programs, ones that draw equal premiums from farmers, the provinces and the federal government and put a cap on the subsidies — premiums can total no more than six per cent of gross revenues and premiums must cover payouts from the funds.

Not all of the provinces have joined those programs, mainly because their provincial programs offer farmers more benefits than the national price support system and the politicians are afraid of angering their farmers.

For example, Quebec won't join the national program for hogs and British Columbia won't join the national plan for beef.

At the time, farmers and the politicians said this proposal went only part way and that something should be done to address all of the many other programs and subsidies that distort the market. They usually refer to this as "top loading" or "bottom loading" or even "side loading".

And that's how the agriculture ministers came to hire Martin's company, Intercambio Limited, to conduct a study of all of the programs and subsidies.

"Reporting the results for this study presents major logistical problems, not the least because with 11 clients and a study team of nine, there is more than a little room for the provision of advice on what should be reported and how," Martin has written in the introduction to one section of the report.

"More importantly, the data, programs and results for the study are contained on 22 rather efficiently organized IBM diskettes."

There's so much information that it's totally impractical to print it all in report form. For example, simply presenting the averages for each of the five fiscal years would have taken up 450 pages.

That amount of data suggests the report covers every subsidy. It doesn't. For example, the subsidies that make grain production cheaper in one region than another are not included. Nor are the substantial subsidies for the veal industry or the impacts of the national dairy policy on beef production.

The study was done to form the basis for negotiation to reduce provincial disparities, yet there have been no indications that any province is willing to give up any of the programs.

Farmers in Alberta and Ontario have led the lobby to get rid of the most blatant of the provincial distortions, mainly because they have assumed they're subsidized the least and are losing out to farmers from the other provinces.

When the study began, it was beef farmers who were expressing the most concern. Now it's hog producers from Manitoba and Ontario, provinces that export hogs to the U.S. and face a countervailing duty of about $10 per hog, a charge that exists to offset the combined total of all of the subsidies paid in every province.

The Ontario and Manitoba farmers are thus being doubly penalized — first, they don't get as much subsidy as producers in other provinces and second, they suffer from the price-depressing impact of the countervailing duty, not just on exports, but on all of the hogs they market.

Dave McDonald, chairman of the Ontario Pork Producers Marketing Board, figures the countervailing duty has depressed Ontario prices by $5 to $7 per hog and, at 100,000 a week, that amounts to between half and three quarters of a million dollars a week.

Hogs
(per $100 cash receipts)

	Direct subsidies	Indirect subsidies
Nfld.	$18.08	$47.80
P.E.I.	$22.33	$15.61
N.S.	$15.96	$15.78
N.B.	$15.56	$15.81
Que.	$ 9.51	$ 2.15
Ont.	$ 4.99	$ 1.55
Man.	$ 5.39	$ 2.95
Sask.	$13.90	$ 2.95
Alta.	$ 9.53	$ 1.98
B.C.	$ 8.33	$ 1.43

Sheep
(per head)

Nfld.	$1,043.68	$969.31
P.E.I.	$ 143.55	$284.14
N.S.	$ 16.11	$ 52.67
N.B.	$ 31.02	$ 63.70
Que.	$ 97.60	$ 6.32
Ont.	$ 6.56	$ 6.98
Man.	$ 1.16	$ 12.19
Sask.	$ 17.19	$ 23.31
Alta.	$ 9.05	$ 6.28
B.C.	$ 19.26	$ 19.36

Beef
(per $100 of receipts)

Nfld.	$ 9.80	$34.82
P.E.I.	$ 9.71	$15.97
N.S.	$ 8.33	$17.94
N.B.	$11.79	$16.59
Que.	$42.15	$ 3.32
Ont.	$ 2.48	$ 1.97
Man.	$ 6.15	$ 3.39
Sask.	$10.47	$ 1.86
Alta.	$ 8.41	$ 2.43
B.C.	$14.85	$ 5.38

Direct subsidies are those that show up in the net income statements of farmers, such as income stabilization plan payments. Indirect subsidies are those that benefit the industry, but don't flow directly to farmers, such as grants for meat-packing plants.

The charts for hogs and beef are subsidies per $100 of farm revenues because the study notes that there are big provincial differences in the types of animals that are marketed — for example, calves from ranches in Alberta and market-ready cattle from feedlots in Ontario. Most sheep are bred, raised and marketed all within the same province, so that chart is in subsidies per head.

STATEMENT OF KRISTEN ALLEN, AGRICULTURAL ECONOMIST, NATIONAL CENTER FOR FOOD AND AGRICULTURAL POLICY, RESOURCES FOR THE FUTURE, WASHINGTON, DC

Ms. ALLEN. Thank you very much, Senator. I commend you on holding the hearing and request that my written statement be received for the record. I will try to summarize fairly briefly. I know time has almost run out.

I would like to say firstly that the United States-Canada Free-Trade Agreement has been held as an historic agreement largely because of the substantial amount of trade between the two countries.

However, not a very substantial amount of it is agricultural trade. About 4 percent in 1986 was agricultural trade. I think we have discussed the free trade provisions that pertain to agriculture fairly considerably today. I am not going to go over them to reiterate any of the details.

I think what really needs to come out, and has come out to some extent today, is that in agricultural trade particularly, if not in other areas, the real barriers to trade are not the tariffs, not the quotas, but the domestic subsidies or other actions that are taken for reasons other than limiting trade.

I would include the domestic programs that give domestic products an edge over imported products, and of course, the technical regulations such as health and sanitary regulations, labeling requirements, and packaging requirements that also impinge upon trade. They were addressed in the Free-Trade Agreement. Additionally, to some extent macroeconomic policies also influence trade.

By and large, these barriers really only received limited attention in the Free-Trade Agreement. There are several reasons for this. They are technically difficult to deal with anyway. Even if you overcome the technical difficulties, they are extremely difficult to deal with in a bilateral agreement.

As both countries are currently involved in the GATT negotiations, there is considerable reluctance to enter into agreements with Canada on agricultural programs that are currently featuring so prominently in the Uruguay round.

And of course, both agricultural sectors in Canada and the United States have in recent years been subject to considerable amount of financial stress, and I think there is an understandable reluctance to change programs that now seem to be stabilizing things.

TARIFFS

What does the Free-Trade Agreement mean for agriculture? Phasing out tariffs: the tariffs right now are relatively low on agricultural products and there are relatively few of them. The area in which they are most likely to have an impact is on horticultural products because the tariffs are a little higher, and horticultural products make up about 50 percent of the U.S. agricultural exports to Canada. We discussed the snap-back provision. I will not go over that.

NONTARIFF BARRIERS

On the formal nontariff barriers, the quotas, licensing agreements and so on, I think the greatest beneficiaries there are Canadian consumers of wine and U.S. producers of wine, although we did have a considerable amount of discussion as to whether Canada can, in fact, enforce the Free-Trade Agreement over the power of the Provincial governments.

I do not want to go over the large concerns on the imposing or reimposing quantitative restrictions. I think we have discussed that at some length. On the elimination of Canada's import license requirements, for oats and barley I suspect there is some benefit to those products almost immediately that the Free-Trade Agreement went into effect if, in fact, it was ratified.

For wheat, I really do not see that that makes very much difference any time soon. Right now, the wheat PSE for U.S. wheat is about 66 percent. For Canada, it is about 50 percent. They are not particularly close.

Senator CONRAD. So your point, if I can stop you, is we are unlikely to see a removal of those certificate requirements anytime soon?

Ms. ALLEN. Yes. For wheat. I think that is correct. Several aspects in the informal nontariff barriers, those being the domestic subsidies and the technical regulations, that are difficult to deal with, are technical difficulties. One is the PSE, using a PSE. We had some discussion on it this morning. I think there are other reservations to using that that I have outlined in my prepared testimony.

TECHNICAL REGULATIONS

Harmonizing technical regulations and packaging requirements, health and sanitary regulations also have technical difficulties. In conclusion, I think the aggregate net direct effects on agriculture from the agricultural provisions are small. I do not think there will be any vast new markets for U.S. agricultural products in Canada, and I do not see a flood of Canadian products coming into the United States.

CONCLUSIONS

Even with completely free trade, which is not what this Free-Trade Agreement will give us, one estimate puts the total net gains to agriculture between $200 million and $500 million. I would stress that there is a need for considerably more detailed quantitative analysis on just what we do expect to get out of this Free-Trade Agreement, and I would say there is a considerably paucity of such analysis.

On the other hand, while the aggregate direct effects are not expected to be large, some regional and commodity effects may be important. On the regional effects, those regions closest to the borders, I think can expect to see an increase in trade and new opportunities for both producers and consumers as north-south trade expands, possibly at the cost of some east-west trade. As you move away from the border, I think these impacts are likely to diminish.

Horticultural products, fruits and vegetables I think will gain. Wines I think will gain, notwithstanding the earlier discussion on the provincial governments' power.

There are possibly longer term net benefits that are more indirect benefits. For example, raising income and raising employment are likely to have some effect on food consumption. They are not likely to be large effects, and they are not likely to be seen immediately.

Naturally, there will be critics of the agreement. I think, by and large, they are groups whose particular wishes were not met by the terms of the agreement. As Ms. Veneman put it, they did not fix, or the agreement did not fix existing problems. And there are groups who feel that they will be disadvantaged in the short term.

U.S. agriculture, as a whole, is unlikely to be any worse off under the Free-Trade Agreement than it is now, at least as the Free-Trade Agreement is now written. Some sectors and some regions may fare differently.

I would remind you, however, that full implementation of the agreement would not be in effect until 1998, and a considerable amount could happen in agricultural policy between now and then. Thank you.

Senator CONRAD. If I might just ask one question before we go to our next witness. In a paper that you prepared earlier, which is not part of your testimony here today, let me just refer to it. It is entitled "Agriculture and the Canada-United States Free-Trade Agreement Opportunities and Challenges." On page 7 you wrote as follows: "Few agriculture groups will be worse off as a result of the agreement as it is now written although it is possible that the implementing legislation may change conditions slightly. The one exception may be U.S. wheat producers. By the time the agreement is fully in place, this group may have to face the choice of giving up some of its subsidies in order to enjoy the same access to Canadian markets as Canadian wheat producers have to the United States market."

Do you still hold to that position, and if so, might you just outline your rationale for it?

Ms. ALLEN. I hold to the position as far as the Free-Trade Agreement at that time had not delved into the section 22 implications. Yes, I think as written, there is that possibility. I can see that the wheat growers definitely could have some reservations about it because there is the issue that U.S. tariffs will come down, and Canadian wheat could come in. The wheat growers, unless they gave up something relatively large in terms of their domestic subsidies would not have equivalent access to Canadian wheat. To give up those subsidies I suspect they would give up a larger amount of income support than they would get in terms of income from the Canadian market.

One might ask why they would bother to try to penetrate the Canadian market if it meant giving up something that was more valuable.

Senator CONRAD. Yes. Good point.

Ms. ALLEN. I think the issue of the section 22 needs to be explored. I do not think there is any question about that.

Senator CONRAD. All right. Thank you very much. Also I enjoyed and read your paper that you prepared earlier.

Ms. ALLEN. Thank you.

Senator CONRAD. It was extremely well-written and interesting as well.

[The prepared statement of Ms. Allen follows:]

AGRICULTURE IN THE CANADA-UNITED STATES FREE TRADE AGREEMENT

Kristen Allen[1]
National Center for Food and Agricultural Policy
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The Canada-U.S. Free Trade Agreement (FTA), which was signed on January 2, 1988, formalizes an idea that for some time has held considerable appeal for businesspeople, policymakers, and economists on both sides of the border. The two countries have similar basic economic conditions, natural resource bases, and heritages. They also have the world's largest bilateral trading partnership. In 1986, total bilateral trade was about $124 billion.[2] There are, however, significant barriers to trade between the two countries. These barriers--tariffs, quantitative and qualitative restrictions, and government programs that give domestic products an edge over imported competition in both countries--prompted the bilateral negotiations that began in May 1986.

Throughout the negotiations both sides emphasized the need for a comprehensive agreement, yet some areas are particularly difficult to address in a bilateral agreement. Agriculture is one such area, because many of the trade barriers stem from underlying domestic policies, which not only are difficult to address in a bilateral agreement, but are also the focus of the agricultural negotiations in the current round (the Uruguay Round) of the General Agreement on Tariffs and Trade (GATT). The remainder of this paper focuses on U.S.-Canadian agricultural trade, and the Canada-United States Free Trade Agreement and its implications for U.S. agriculture.

U.S.-CANADIAN AGRICULTURAL TRADE

In 1986, the two countries traded US$4.5 billion worth of agricultural products, which was just under 4 percent of their total bilateral trade that year. The main agricultural exports from the United States to Canada are horticultural products, animals and animal products, feeds, oilseeds, and oilseed products. Horticultural products, fruits, nuts, vegetables, and wines, accounted for almost one half of the U.S.'s $2.4 billion of agricultural exports to Canada in 1986.[3] The agricultural products that the United States imports from Canada are mainly livestock products, live animals, grains, and grain products. For both total and agricultural trade, Canada is more dependent upon the United States than vice versa. In agricultural trade, Canada sends between 20 percent and 30 percent of its exports to, and buys almost 60 percent of its imports from, the United States. Meanwhile, Canada supplies just under 10 percent of U.S. agricultural imports and buys a mere 5 percent of U.S. agricultural exports.[4]

Canada's agricultural exports to the United States have increased steadily in recent years. Agricultural exports in the

other direction were relatively stable between 1980 and 1984, but dropped off noticeably in 1985 and 1986. In 1986, the United States had a farm product trade surplus with Canada of about US$600 million, compared to a surplus of about US$1.5 billion in 1980.[5] Reconciling U.S. and Canadian trade data has been under discussion in recent months. Normile and Goodloe used import data from each country to obtain estimates of exports from the other; i.e., U.S. agricultural exports are taken to be what Canada reports as imports from the United States. The data may, therefore, differ from those in other reports that rely on one country's import and export statistics.

The shift has occurred as the U.S. dollar strengthened against the Canadian dollar, which is due more to macroeconomic events than to events within the agricultural sector.

Agricultural Trade Barriers

There are three types of barriers to agricultural trade between the United States and Canada: tariffs; formal, nontariff barriers; and informal, nontariff barriers.

The agricultural products traded between the United States and Canada are subject to relatively few tariffs. Both countries raise some tariffs during the production season, mainly for fruits and vegetables, and they are generally higher for processed products. Most tariffs on raw commodities are below 10 percent of the unit value, except for fruit and vegetables, where they average between 10 and 15 percent of the unit value.

Both the United States and Canada use quotas and other formal nontariff barriers (NTBs) to limit imports of some products. Beef imports, for example, are subject to counter-cyclical quotas in both countries. The United States, in addition, uses quotas on sugar, cotton, and dairy products to protect the domestic support programs. In conjunction with its domestic supply management programs, Canada uses quotas for poultry and eggs, and licenses, permits, and quotas for milk and other dairy products. Other formal NTBs used by both countries include licensing, blending requirements (for eg., wines and spirits), government procurement and distribution regulations, and import safeguards.

The informal, nontariff barriers may prove to be the most insurmountable in the FTA. Informal NTBs are those government actions that are primarily for other purposes, but that can, nevertheless, have an effect on trade. They include differences in the systems of government in the two countries, different approaches to supporting agriculture, and nontariff border measures such as phytosanitary regulations and packaging and labelling requirements.

THE CANADA-UNITED STATES FREE TRADE AGREEMENT AND ITS IMPLICATIONS FOR U.S. AGRICULTURE

Agriculture received special attention in the Canada-U.S. FTA. In the chapter on agriculture there are several general agricultural provisions, but the majority concentrate on removing tariffs and lowering or eliminating NTBs. Although the agreement does not explicitly require major changes in the underlying agricultural policies in either country, in seeking to reduce

trade barriers it does, to some extent, impinge upon domestic programs. In addition, there are two general provisions that could affect agriculture.

General Provisions

Two general provisions of the agreement could have important implications for U.S. agriculture: the provision relating to import safeguards and the one that deals with dispute settlement procedures. Under the former, industries in either country that were injured by import competition would continue to have access to temporary relief. During a three year transition period such relief would mean that if imports from either country were found to be causing injury in the other, the lower duties resulting from the FTA could be suspended. Under the dispute settlement provision, both countries would keep their national laws pertaining to subsidized imports (countervailing duties) and antidumping. A bilateral panel would be established to review disputes regarding the application of trade remedy laws, but the panel would not have binding authority on such disputes.

Agricultural Provisions

General Both countries would agree to refrain from subsidizing exports to each other, and from dumping agricultural products in the other's markets, and would take into consideration the other's interests when subsidizing exports to third markets. The two countries would consult semiannually and, if necessary, at other times by mutual agreement, on agricultural issues.

Tariffs The FTA would phase out tariffs on agricultural products by 1998. As noted previously, however, tariffs on most raw commodities are already quite low, so the phase-out may not generate much additional agricultural trade between the two countries. One possible exception is horticultural products. For some horticultural products, mainly fresh fruit and vegetables, Canada has maintained high seasonal tariffs. The removal of these seasonal tariffs would benefit mainly consumers in both countries, through lower prices, and U.S. producers, through expansion of Canadian imports, with some gains being realized by those Canadian producers closest to large U.S. population centers.

To offset any major disruptions resulting from phasing out tariffs on horticultural products, the agreement contains a "snap back" provision. If, under the new terms, imports are considered to disrupt domestic markets, both countries are permitted to reimpose the current, most favored nation (MFN) tariff. This option will be available for twenty years from the implementation of the agreement and has well-defined limitations on its use.

Formal Nontariff Barriers Each country would exempt the other from its meat import quotas. The United States would exempt from quotas, Canadian products containing 10 percent or less sweetener (including sugar). Canada would slightly increase its global quotas on eggs, poultry, and poultry products. U.S. poultry and

egg producers would be the most likely beneficiaries of this quota increase. Canada also would eliminate the import license requirement for wheat, oats, and barley and their products once the support levels in the United States were equal to or less than those in Canada.

Another provision would prohibit either country imposing or reimposing quantitative restrictions on grain or grain-product imports from the other country. The prohibition would apply provided neither country made significant changes in its support programs that would cause imports from the other country to rise.

Under the FTA, Canadian consumers would have access to a greater variety of U.S. wines and spirits. At present, Canadian provincial Liquor Control Boards determine which wines can be imported. U.S. wines currently account for only about 3 percent of all listings. This percentage should increase under the FTA, and the selection process should become more open. Discriminatory mark-ups--those above actual cost-of-service differentials--on distilled spirits would be eliminated immediately and those on wines phased out by 1995. As a result, U.S. wines and spirits would be relatively cheaper in Canada than they are now, although it is expected that U.S. wines would continue to be somewhat more expensive than Canadian wines.

Informal Nontariff Barriers The Canada-U.S. FTA seeks to reduce trade barriers between the two countries, not, as has become a goal in the Uruguay Round, to change fundamental characteristics of domestic agricultural programs. Yet, a variety of market intervention, protective, and subsidy programs used by the United States and Canada, and many other industrial countries, often create or require trade barriers.

Subsidies In the United States, most support for agriculture comes from the federal government and includes price supports, export subsidies, storage programs, the conservation reserve, subsidized credit, and research and extension programs. In Canada, both the federal government and the provincial governments provide support for agriculture. The programs include income stabilization, transportation subsidies, Canadian Wheat Board activities, subsidized credit, and research programs.

Under the FTA, Canada would eliminate transportation subsidies for agricultural products shipped to the United States via west coast ports. These subsidies are currently available under the Western Grain Transportation Act (WGTA). However, since most U.S. agricultural imports from Canada are shipped via eastern ports, mainly Thunder Bay, this provision will have only a limited effect on the total Canadian transport subsidies provided to U.S.-bound products.

As mentioned in the previous section, Canada would eliminate the import license requirement for U.S. oats, barley, and wheat as soon as the level of U.S. government support for these commodities is equal to or less than that provided by the Canadian government. The agreed-upon yardstick to measure the level of support is producer subsidy equivalents (PSEs). PSEs are the level of subsidy that would be necessary to compensate producers (in terms of income) for removing all existing government support. They can be expressed in various ways, the most usual is as a percent of the total value to the producer

(from both the market and government programs) of one unit of output. The most recent USDA estimates of PSEs for wheat are 66 percent in the United States and 50 percent Canada for 1986/87.[6] For oats and barley the import license requirement would likely be removed as soon as the FTA is implemented. For wheat, because the U.S. PSE is so much higher than that for Canada, it is unlikely that the import license requirement would be lifted unless there were some significant changes in the U.S. wheat program.

Reducing agricultural subsidies and using PSEs to measure the level of subsidization in the bilateral agreement will not be an easy task. Reservations about using PSEs in trade negotiations have been expressed by various observers. A short list would include the following reservations. The question of which policies to include has been contentious. Policies that have little trade distorting effect, or that work to reduce distortions, for example, supply controls, do not fit neatly into PSE calculations. An aggregate measure of support such as the PSE could be so complex to estimate that it could delay the implementation of some provisions. A country's PSE can be changed by other countries' behavior, particularly via changes in exchange rates and by changes in large countries' farm programs. And the choice of reference price and base periods against which to measure PSE changes can be of great consequence, and is, therefore, itself subject to negotiation.

Although the Canada-U.S. FTA appendix contains a very thorough explanation of the formulae and means of computing the levels of support, the measurement may prove more difficult in practice. One of the additional technical difficulties not addressed by the FTA is that of the potential impact of exchange rate shifts on agricultural trade flows between the two countries. As noted in the section on U.S.-Canadian agricultural trade, in recent years the change in the pattern of bilateral agricultural trade has been due largely to the strength of the U.S. dollar.

Two issues are pertinent to the broader question raised by including domestic policy changes in the bilateral trade agreement. Both countries are currently involved in the Uruguay Round of the GATT negotiations, where agricultural subsidies are receiving particularly close scrutiny. Therefore, both must be somewhat reluctant to enter into commitments on agricultural subsidies in a bilateral context because of the obvious difficulty of limiting concessions to one trading partner. Second, the agricultural sectors in both countries have, in recent years, been buffeted by financial problems that stem, at least in part, from increased global interdependence. This pervasive sectoral stress makes it difficult for any government to agree to actions that may exacerbate that stress in the short term, regardless of the potential long-term benefits.

Answering these questions will remain challenges to the members of the working groups to be set up under the terms of the agreement.

Technical Regulations and Requirements The FTA calls for the two countries to work towards harmonizing technical regulations and inspection procedures. It also calls for elimination of those practices that constitute unnecessary trade barriers, including phytosanitary regulations and labelling and packaging requirements.

While such goals are probably laudable, achieving them may prove quite difficult and there appears to be little incentive to reach a speedy resolution.[7] These regulations and requirements exist primarily to protect human health and their impact as trade barriers are mere side-effects. In trying to harmonize these regulations, difficulties arise at several stages. Discussions of their legitimacy in bilateral (or multilateral) negotiations often become bogged down in technical details that are little understood by economists and political negotiators. By the end of the day, those in the latter two groups have lost interest while the technical experts are just warming up. Once bilateral agreement is reached on what are legitimate health or safety regulations, domestic hurdles may exist. For instance, within the United States the USDA, the EPA, and the FDA often hold quite different views on standards, tolerance levels, and issues of measurement. Even if the domestic hurdles are overcome in both countries, it is possible that in the actual process of harmonizing the regulations, one country could incur considerably greater costs than the other. Such an inequity would raise the issue of compensation, which in itself would likely be the subject of prolonged negotiations.

While labelling and packaging regulations may give rise to arguments along similar lines to those for phytosanitary regulations, it is unlikely that they will invoke such detailed technical esoterica.

CONCLUSIONS

The net economic effects of the Canada-United States FTA are difficult to gauge. The agreement would not open vast, new markets for U.S. agricultural products. Nor will it open the floodgates for a torrent of products flowing from Canada into the United States. One discussion of estimates of the net gains from completely free trade between the two countries suggests they could range from $200 million to $500 million.[8] Although the FTA is a step towards a free trading environment, it is not a perfect agreement. The net economic gains for agriculture from this agreement would likely be smaller than those rough estimates. The paucity of detailed, quantitative analysis of the provisions of the agreement highlights an area not addressed by the FTA: the need for continuing analytical work. Ongoing cooperation among analysts from both sides of the border would surely improve the quality of the debate and, if the FTA becomes law, the chances of its smooth operation.

While the aggregate, direct, economic effects from the agricultural provisions of the FTA seem to be fairly small, the effects on some regions and some commodity groups could be more noticeable. The agricultural products that will be most affected by the FTA will be horticultural and processed products, which are now subject to higher tariffs than are raw commodities. These products would also be among those most affected by any changes in labelling, packaging, and phytosanitary restrictions that resulted from the FTA.

In the regions closest to the border, in both countries, expansion of north-south trade could be expected to offer new opportunities for both producers and consumers. These impacts

would probably diminish the further one moved away from the 49th parallel.

Longer-term, indirect effects of the FTA on agriculture should not be overlooked. If, in the long term, the FTA raised income and employment in general, the demand for food products, particularly higher priced items, could increase.

These gains are, of course, nebulous and distant. There will be some who find fault with the agreement. For the most part, the critics will tend to be in those groups who feel that their particular wishes would not be met, or who feel that they could be disadvantaged in the short term by some of the provisions of the FTA. It is unlikely that many agricultural groups will be worse off as a result of the agreement as it is now written. What should be kept in mind is that the agricultural provisions of the agreement would not be fully in place until 1998 if the agreement goes into effect on January 1st, 1989. A great deal could happen on the agricultural policy scene before then.

Footnotes

1. Testimony before the U.S. Senate Committee on Agriculture, Nutrition and Forestry, May 24th, 1988. The views expressed in this paper represent those of the author and should not be taken as the official position of either the National Center for Food and Agricultural Policy or Resources for the Future.

2. U.S. Department of Commerce, Bureau of Economic Analysis. 1988. Survey of Current Business vol. 68, no. 2 (Washington, D.C., U.S. Government Printing Office, 1988)

3. Boyd M. Buxton and Leslie Berger, "Produce Trade and the U.S.-Canada Agreement," Agricultural Outlook, AO 139 (Washington, D.C., U.S. Department of Agriculture, Economic Research Service, March 1988)

4. U.S. Department of Agriculture, "U.S.-Canada Free Trade Agreement: Issues and Impacts on Agriculture." (Draft, Washington, D.C., Economic Research Service, August 1988).

5. Mary Anne Normile and Carol Goodloe, "U.S.-Canadian Agricultural Trade Issues," (Washington, D.C., U.S. Department of Agriculture, Economic Research Service, forthcoming)

6. Personal communication from Carol Goodloe, Economic Research Service, USDA.

7. See Carol S. Kramer, "Harmonizing Health and Safety Standards in the GATT: Proposals and Issues" (Draft, Resources for the Future, Washington, D.C., December, 1987).

8. Andrew Schmitz, "Summing Up: The Canadian Perspective," in Kristen Allen and Katie Macmillan, eds., U.S.-Canadian Agricultural Trade Challenges: Developing Common Approaches, (Washington, D.C., Resources for the Future, forthcoming).

Senator CONRAD. Next we will hear from Frederick Ikenson who is a member of the Board of Directors of the Customs and International Trade Bar Association, Washington, D.C. Welcome, Frederick. Proceed.

STATEMENT OF FREDERICK L. IKENSON, MEMBER, BOARD OF DIRECTORS, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION, WASHINGTON, DC

Mr. IKENSON. Thank you, Mr. Chairman. I am very pleased to be here today. We will be speaking about something that is usually not a direct concern to members of your committee, but it is certainly of general concern, I should think, to all Members of the Congress including the Senate.

The Customs and International Trade Bar Association is a national association of customs and trade lawyers which has been in existence for over 60 years. Our members practice before the International Trade Commission, the Commerce Department, the Customs Service, and various federal courts, primarily the U.S. Court of International Trade, and the Court of Appeals for the Federal Circuit.

Last fall the members of our Trial and Appellate Practice Committee learned of the proposal to include in the Canadian Free-Trade Agreement a procedure which would replace judicial review of antidumping and countervailing duty law decisions with something described as binational panel review.

After substantial research and discussion, our Trial and Appellate Practice Committee reached the conclusion that the panel review procedure was extremely unwise and probably unconstitutional. When our board of directors reviewed the issue, we reached the same conclusion initially. Subsequently, both the committee and the board of directors became convinced that the panel procedure was unconstitutional as well as unwise.

We have already submitted a number of papers on the subject to the Congress. Our bar association takes no position on the wisdom of a Free-Trade Agreement with Canada. We are absolutely opposed, however, to the replacement of judicial review as we now know it with some binational panel procedure.

Our opposition is based on strong policy grounds and on constitutional grounds. I would like to divide my discussion into three parts with your permission. First, I would like to discuss the trade law remedies to be affected. Second, I would like to discuss judicial review as it currently works. And third, I would then turn to review under the proposed panel mechanism.

TRADE LAWS

With regard to the trade laws, the ones that are affected will be the antidumping and countervailing duty laws. These two trade law remedies are not protectionist in nature or in concept. Rather they are designed to ensure fair trade. The antidumping law is designed to offset margins of dumping by equalizing duties.

The countervailing duty law is designed to offset or neutralize foreign government subsidies by countervailing duties. In either case, antidumping duties and countervailing duties are not penalty

duties. They are neutralizing duties designed to ensure fairness. The way the laws work is, with regard to dumping and subsidization, the Commerce Department makes the determination: is there dumping, is there subsidization, and by what amount.

The amounts are very, very important because the amount as determined will be the amount of duty paid by the importer. The International Trade Commission makes the determination of material injury or threat of material injury. Without such a finding by the Commission, the dumping or subsidization is not actionable under our laws.

Among other things that the International Trade Commission does is it considers the impact of unfairly traded product, that is subsidized product and dumped product from multiple sources. It cumulates products from, let us say, Canada, United Kingdom, Taiwan, to determine the impact or effect of these cumulated imports on United States industry. And it is possible that imports from any one of those sources may not be sufficient to cause injury, but in the aggregate, they could be found to cause injury.

JUDICIAL REVIEW

Now with regard to review, judicial review under our current system, of findings by these agencies, first, affected parties may challenge determinations that aggrieve them in the Court of International Trade. And affected parties are U.S. importers, foreign exporters, U.S. domestic producers, labor unions, et cetera.

They would be able to go to a U.S. federal court whose judges are appointed under article III of the Constitution. They serve for life under terms of good behavior, undiminished pay, and all of the safeguards that the founding fathers intended our system to have are there.

We are ensured objectivity as best as we can hope to get it. When a case is brought to the Court of International Trade, the complaining party files the usual court papers, a summons and complaint. Other parties may be permitted to intervene, and then the administrative record is transmitted by the agency to the court.

Very often the administrative record will contain confidential information. That information is made available under court procedure to lawyers under protective order. Very often there are disputes about the content of the record. Has the record been unlawfully diminished? Should it be augmented? These disputes are brought to the court's attention and are resolved by the court.

Very often, and now quite commonly, Commerce Department makes use of the computer to quantify subsidies and dumping margins. Very recently, lawyers have been attempting with success to gain access to computer programs and computer tapes so that they can determine whether Commerce's calculations are erroneous.

And in my own experience, we have found from using the Commerce Department's computer programs and tapes that we have been able to detect errors that, without the assistance of these computer materials, we would not be able to detect.

All of this goes on under the ambit of judicial review in our Court of International Trade. When a decision is made, parties have a right to take appeals. The appeals are taken to another fed-

eral court, the Court of Appeals for the Federal Circuit. Aggrieved parties from that court have a right to petition for review by the Supreme Court.

REVIEW UNDER THE PROPOSED PANEL MECHANISM

Now what does the Canadian Free-Trade Agreement propose in lieu of judicial review? It proposes a procedure whereby a panel of 5 persons will review antidumping and countervailing duty determinations. The 5 persons will be chosen from a pool of 25 persons selected by the Canadians and 25 persons selected by the United States.

On any given panel, it is likely that there will be at least two Canadian persons and at least two Americans. Chances are that half the time these panels will have three Canadians, two Americans, and of course, half the time the other way around.

Additionally, not everyone on the panel needs to be learned in the law. So it is entirely possible for matters of U.S. law to be determined by panels, the majority of which will be Canadians, and these panels are going to have the final say on interpreting U.S. law.

Senator CONRAD. Let me just stop you there. That is fairly remarkable when you think about it. If I can rephrase what you are saying, we could have a situation in which U.S. law is interpreted and applied by a panel of which a majority are Canadians?

Mr. IKENSON. That is correct. That should happen half the time.

Senator CONRAD. Half the time we would have a panel comprised of a majority of Canadians interpreting a U.S. law?

Mr. IKENSON. Correct.

Senator CONRAD. You have raised an issue which is, I think, of enormous significance. You have said that in your view, in the view of the Customs and International Trade Bar Association, that the binational panel is unconstitutional?

Mr. IKENSON. That is true. That is our belief.

Senator CONRAD. You are saying if there was a court challenge to the binational panel, which is central to the whole Free-Trade Agreement, that it would fall as a result of a constitutional challenge?

Mr. IKENSON. That is our opinion. There are others in the legal community who have expressed different views about the constitutionality of this proposal. We disagree with them. We feel that——

Senator CONRAD. Well, they are wrong, are they not?

Mr. IKENSON. In our view.

Senator CONRAD. That would be why you would disagree.

Mr. IKENSON. Well, that is our judgment. But there are really two issues closely tied together. One, is the proposal unconstitutional, and second, even if it were not, does it really make good sense for us to replace what we have after over two centuries of experience with the federal court system and experiment with something which is really not entirely new? It is not that much of an experiment, Senator Conrad.

A little over 200 years ago when the founding fathers signed the Declaration of Independence, one of the grievances was that colonial judges could be removed at the pleasure of the king, and the

founding fathers wanted a system of judicial review which would provide independent judicial review, and that, of course, is what we have in our Constitution.

Our judges, federal judges, are independent. It would be somewhat ironic for us to give that up and to have half of our trade cases decided by a panel, the majority of which, if my recollection of history serves me correctly, are still subjects of the Queen.

Senator CONRAD. Let me just pursue this one minute further because what you have said here is terribly important testimony. Your assertion is that the binational panels, which are so central to this agreement, are simply unconstitutional. In your judgment, what is the underlying principle that would hold them unconstitutional?

Mr. IKENSON. Well, there are two principal issues as we see it. First, we think that this agreement makes a radical change in our structure of government. Under our system of government, there are three principal articles of the Constitution. Article I, of course, gives the Congress its power. Article II, the executive its. And article III gives power to the judiciary.

Senator CONRAD. Nowhere in article III is it mentioned that Canadians would be interpreting United States law; is it?

Mr. IKENSON. Well, it is not just Canadians. We have no particular suspicion of Canadians. I certainly do not. My wife is Canadian.

Senator CONRAD. Any foreigners for that matter?

Mr. IKENSON. But quite frankly, the persons who are going to interpret the law should be subject to the safeguards that article III has created for us: an independent judiciary.

And what have we done in our Constitution to ensure an independent judiciary? The Congress cannot diminish the pay of judges. The Congress cannot remove judges nor can the President except under very special circumstances.

That is one thing. It radically changes the nature of our government, the organization of government. Second, from colonial times, importers had a forum in which they could contest the assessment of duties. At the Constitutional Convention, one of the core issues that was discussed was a forum in which customs duties could be litigated. From the beginning of the country, the Congress in its wisdom has seen fit to give importers the right to go to court, and it was always a federal court, and challenge the assessment and collection of duties.

The fact that the duties that we are talking about here are not ordinary duties should make no difference. If a countervailing duty assessment is imposed on an importer, or an antidumping duty assessment and it is wrong, and it puts him out of business, under our culture and under our traditions, we believe he should have his day in court, and this agreement does not give him that day in court.

Senator CONRAD. To paraphrase what I hear, you are saying that this is a radical departure from the system of judicial review that we have had for 200 years?

Mr. IKENSON. With respect to importers, yes, sir. The first countervailing duty of general application was enacted in 1897. Almost immediately, importers assessed with countervailing duties challenged those assessments in court. In the early days, there were

two Supreme Court cases in which countervailing duties were challenged. But the problem becomes more complex. American manufacturers in the past, more than 20 years ago, did not necessarily have the same right that the importer had to challenge negative countervailing duty determinations.

In fact, in 1971, a Federal Appeals Court declared that they had no such right. Congress reacted very, very swiftly and perhaps furiously to that decision. In the Trade Act of 1974 Congress took special pains to give American manufacturers, American producers, the same right to judicial review that importers had.

And those rights were improved upon in the Trade Agreements Act of 1979. This has been the direction that the Congress has been moving in, certainly over the last 20 years. And I must say the direction in which Congress has been moving has been resisted by executive branch personnel.

The executive branch decisionmakers do not particularly like to have a court looking over their shoulder suggesting that, well, that determination of yours may have been politically motivated, or it may not be bottomed in law.

So there has been a hostility to the increased availability of judicial review by the executive branch decisionmakers, and we are very concerned that what the administration is attempting to do here will serve as a prototype for future arrangements between the United States and other countries where judicial review on trade matters will be all but a memory.

Senator CONRAD. Let me just ask you this question. Article 1904, section 1 of the agreement reads, and I quote: "The parties shall replace review of final antidumping and countervailing duty determinations with binational panel review."

In your analysis, does this mean the binational panel could preclude a ruling on trade laws by the United States Supreme Court?

Mr. IKENSON. Absolutely. The administration will present to you legislation which will preclude judicial review of matters that will be subject to panel review. They will be mutually exclusive.

Senator CONRAD. Perhaps we should have put you on first because what you are saying is dramatic testimony on the whole question of the structure of this agreement. If you are correct and your organization is correct, and I would assume that the Customs and International Trade Bar Association is fairly knowledgeable on these questions, that the binational panel is unconstitutional, we have taken the guts right out of this agreement.

What is left if, in fact, we had a finding that the binational panel is unconstitutional? In your analysis what would be the result?

Mr. IKENSON. Well, I cannot speak for the Canadians. We do not understand why the Canadians feel that this is a sine qua non to the agreement, nor for that matter can we understand why the administration feels that way.

We feel that the current system of judicial review is fine. If anything, it could be fine-tuned. But it certainly should not be abandoned.

Senator CONRAD. What we are talking about now is a fundamental principle. We are talking about a fundamental principle of our constitutional history, which we arrived at through intense strug-

gle. Are there any other agreements that so challenge 200 years of constitutional history in this country?

Mr. IKENSON. I do not know that I can answer that question. If you are asking whether there have been other agreements that have imposed panels to resolve international disputes, there have indeed been such, but not the kind of dispute that is at issue here.

We are not talking about a boundary dispute between countries. We are not talking about a dispute involving a corpus of money in some foreign government's hands which has to be distributed. We are talking about private rights of American citizens, and those rights should be adjudicated by federal courts.

I am aware of no agreement in which we have eliminated or attempted to eliminate those rights.

Senator CONRAD. That is pretty sobering testimony.

Mr. IKENSON. That is why, Senator, our organization has become so active on this issue. We have no particular ax to grind. We have no clients whom we are serving on this matter. We just feel as lawyers the United States has given up something of its birthright when it went to the bargaining table with the Canadians and gave away this right to judicial review.

We are extremely bothered by it, and we are appearing at various hearings such as this one to express our concerns to the Senate.

Senator CONRAD. Well, we appreciate the testimony that you have provided, and as with all other witnesses, your full remarks will be included in the record. There is also a statement from the National Governors Association which we will include in the record.

[The statement of Frederick L. Ikenson and the statement of the National Governors' Association follow:]

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION'S SUPPLEMENTAL STATEMENT IN OPPOSITION TO THE BINATIONAL DISPUTE SETTLEMENT PROVISIONS IN CHAPTER NINETEEN OF THE CANADA-UNITED STATES FREE-TRADE AGREEMENT WITHDRAWING JURISDICTION FROM UNITED STATES COURTS TO REVIEW ANTIDUMPING AND COUNTERVAILING DUTY DECISIONS OF FEDERAL AGENCIES INVOLVING CANADIAN MERCHANDISE

ADOPTED BY THE BOARD OF DIRECTORS
CUSTOMS AND INTERNATIONAL TRADE
BAR ASSOCIATION

March 8, 1988

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION'S SUPPLEMENTAL STATEMENT IN OPPOSITION TO THE BINATIONAL DISPUTE SETTLEMENT PROVISIONS IN CHAPTER NINETEEN OF THE CANADA-UNITED STATES FREE-TRADE AGREEMENT WITHDRAWING JURISDICTION FROM UNITED STATES COURTS TO REVIEW ANTIDUMPING AND COUNTERVAILING DUTY DECISIONS OF FEDERAL AGENCIES INVOLVING CANADIAN MERCHANDISE

I. Introduction

On December 3, 1987, the Board of Directors of the Customs and International Trade Bar Association adopted a Statement in opposition to the withdrawal of jurisdiction in the United States Court of International Trade and its appellate tribunals to review antidumping and countervailing duty decisions of Federal agencies involving Canadian merchandise.

The Statement was adopted in response to the initialed agreement of October 30, 1987, and in contemplation that the policy and constitutional questions raised therein would be considered in the negotiations which it was believed that the Executive and Legislative Branches of the Government would engage in prior to agreement to the Final Text. This unhappily did not occur and the Final Text was agreed to on December 9, 1987, without that prior consultation which had been expected.

In view of the Final Text and the expected submission of the Agreement to the Congress with implementing legislation within the near future, the Association has reexamined the position set forth in its December 3 Statement, and unanimously adopted this Supplemental Statement at its meeting of March 8, 1988. It adheres to its opposition to the divestiture of the jurisdiction of the United States courts to review antidumping and countervailing duty decisions of the International Trade Administration of the Department of Commerce (ITA) and of the International Trade Commission (ITC) on Canadian merchandise. The Final Text, while removing some of the ambiguities in the

initialed summary, spells out the denial of judicial review in these matters to which we continue to be opposed both on policy and constitutional grounds.

This Statement fleshes out the constitutional bases of our objections. We did not attempt to do so in our December 3 Statement because of the time restraints and the strength of the policy reasons against denial of judicial review. We continue to believe in those policy arguments[1] and while we will summarize them in this Statement, as well as discuss particular provisions of Chapter Nineteen of the Agreement, we will emphasize the constitutional issues which we believe should compel the deletion of this chapter from the Agreement.

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1. The policy arguments hitherto advanced for retaining judicial review were highlighted recently in an article in the Fall 1987 issue of The International Lawyer co-authored by Alan F. Holmer and Judith Hippler Bello, then General Counsel and Deputy General Counsel for the U.S. Trade Representative, writing on "The U.S.-Canadian Lumber Agreement: Past as Prologue". The authors there stated, at pp. 1197-1198:

> The lumber agreement and the developments leading to it are significant for several reasons. First, the evolution of the CVD law in general and of the specificity and subsidy tests in particular reflect Commerce's and the court's intellectual honesty and openmindedness in interpreting and applying the CVD law. The Department has shown that it is willing to reconsider issues if interested parties marshall appropriate information and arguments warranting reconsideration.
>
> Second, the litigation spawned by the 1983 Commerce decisions on natural resources demonstrates the importance and effectiveness of the substantially increased judicial review provisions enacted by the Congress in 1979.* Congress intended to provide more opportunities for judicial review, in large part as a check on Executive Branch discretion in administering the countervailing duty and antidumping laws.* Recently the courts have played a significant role in shaping the course of the CVD law. At least theoretically, this should reduce the pressure that disappointed U.S. petitioners attempt to apply to the Congress to amend the law whenever Commerce makes any determination adverse to their interests.*

* (Footnotes are omitted.)

II. The Denial of Judicial Review of ITA and ITC Final Antidumping and Countervailing Determinations is Unconstitutional

1. Introduction

It is important to understand that the binational panels in reviewing ITA and ITC Final Antidumping and Countervailing Determinations will be reviewing domestic United States statutory provisions.[2] The effect of the panels' decisions can result in the assessment of dumping or countervailing duties on an importer or the denial of relief to a petitioner whether a United States manufacturer, producer, wholesaler, labor union, or consumer group seeking to have such duties assessed. Both the countervailing and antidumping laws antedate the FTA (Canada-United States Free-Trade Agreement) by over sixty years, the origins of the present countervailing duty statute being section 5 of the Tariff Act of 1897[3] and that of the antidumping provisions, the Antidumping Act of 1921.[4]

International agreements, like statutes, must conform to the Constitution. Reid v. Covert, 354 U.S. 1, 16-17 (1957); The Cherokee Tobacco, 78 U.S. 616, 620-21 (1871). Accordingly, it is impermissible for such agreements to modify the basic character of the Government as contemplated by the Constitution. Speaking specifically with respect to treaties, the Supreme Court stated in Geofroy v. Riggs, 133 U.S. 258, 267 (1890):

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2. Article 1902 of Chapter 194 of the Agreement provides that "Each party reserve the right to apply its antidumping law and countervailing duty law to good imported from the territory of the other Party." (Emphasis added.) Article 191 spells out what the statutory provisions are.

3. Act of July 24, 1897, 30 Stat. 151.

4. Act of May 27, 1921, c. 14, 92 Stat. 11.

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itelf and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. [Emphasis added.]

This passage from Riggs was quoted and endorsed in the more recent case of Reid v. Convert, supra, 354 U.S. at 17-18. There, an argument was made that a treaty could be the basis for denying a U.S. citizen a right protected by the Sixth Amendment. Speaking in a plurality decision, Mr. Justice Black stated (354 U.S. at 15-17):

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. *** The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Justice Black further stated (354 U.S. at 5-6):

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. [Footnote ommitted.]

It is therefore clear that the trade agreement in question must conform to the Constitutional scheme of the Government. The agreement is constitutionally defective to the extent it fails to conform to that rule.

A. The Binational Panel Would Modify the Basic Scheme of the National Government

Articles I, II, and III of the Constitution place the powers of the National Government in the three specifically identified Branches: the Legislature, the Executive, and the Judiciary, respectively. Accordingly, the power exercised by the Government must be exercised by one of these identified Branches or by an agency or other delegatee lawfully empowered to perform a governmental role. Logically, it would modify the

character of the Government if any power defined by the Constitution were exercised by any other body or organization.

In broad terms, three inquiries are required to determine whether the binational panel is constitutional in the contemplation of Articles I, II, and III. The first can assume that the panel would perform a function essentially judicial in nature, and with this assumption the question then becomes whether the panel conforms to Article III. The second can assume that the panel would perform a function essentially legislative in nature, like the functions performed by "administrative courts" established by Congress under Article I (such as the Tax Court and the Court of Military Justice). When this is assumed the question becomes whether Congress may constitutionally delegate legislative power to an international forum like the binational panel which is in no way a part of the United States Government but which would perform an important law-making function. Finally it can be asked whether the establishment of the panel can be justified by inherent powers in the Executive. If the answer to all of these questions is "no", the panel is outside the scope of the Constitution and is therefore an unconstitutional institution.

For one thing, it is not an "inferior" court, i.e., a court inferior to the U.S. Supreme Court. For another, its members are not Federal judges appointed for life during good behavior. The panel therefore fails, for these reasons alone, to meet the standards of Article III, so Article III cannot be the basis for justifying this would-be institution. See, generally, Glidden Company v. Zdanok, 370 U.S. 350 (1962).

B. The Binational Panel Would Violate Article III of the Constitution

Article III provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." We believe that the attempt to preclude judicial review of ITA and ITC dumping and countervailing duty determinations that result in increased

duties would be found unconstitutional as an attempt to give to the binational pan powers belonging properly to the courts of the United States.[5]

In 1956 both the Senate and House Judiciary Committees, in reports in suppo of the Act of July 14, 1956 recognizing the predecessor of the CIT as an Article I Court, observed:

> Customs Court handles cases which very properly come within the judicial power of the United States as set forth in article III, which provides that such judicial power shall extend to controversies to which the United States shall be a party. Thus, there can be no doubt that the Customs Court should be a constitutional Court.

In 1962 the Supreme Court blessed this action and held that Customs litigation properl belonged in an Article III Court. Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

Since that time the Supreme Court in Northern Pipeline Co. v. Marathon Pip Line Co., 458 U.S. 50 (1982) and Thomas v. Union Carbide Agric. Products Co., 47 U.S. 568 (1985) has recognized that whether a public rights vs. private rights rationa is used or not,[6] if the subject matter of the suit was recognized at common law or i equity at the time of the founding of the Republic, review by an Article III Court i required. As the majority said in Thomas, supra, (p. 587):

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5. See Justice Brennan's concurring opinion in Thomas v. Union Carbide Agric Products Co., 473 U.S. 568, 594 ff (1985); and Justice Brennan's plurality opinio in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

6. Note Justice Brennan's comment on this point in Thomas as he refers to hi opinion in Northern Pipeline:

> I agree with the Court that the determinative factor with respect to the proper characterization of the nature of the dispute in this case should not be the presence or absence of the Government as a party. See ante, art 586, 87 L Ed 2d, at 423. Despite the Court's contrary suggestions, the plurality opinion in North Pipeline suggests neither that "the right to an Article III forum is absolute unless the Federal Government is a party of record" nor that "Article III has no force simply because a dispute is between the Government

> Most importantly, the statute in Crowell displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus it clearly fell within the range of matters reserved to Article III courts under the holding of Northern Pipeline. See 458 US, at 70-71, and n 25, 73 L Ed 2d 598, 102 S Ct 2858 (plurality opinion) (noting that matters subject to a "suit at common law or in equity or admiralty" are at "protected core" of Article III judicial powers); id., at 90, 73 L Ed 2d 598, 102 S Ct 2858 (opinion concurring in judgment) (noting that state law contract actions are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789").

Given the historical fact of customs duty suits in law or equity in England and pre-constitutional United States[7], the clear expression of Congress in its 1956 recognition of the CIT's predecessor as an Article III court and the holdings of the majority of the Supreme Court on the constitutional requirement for Article III court review, there can be no doubt that the binational panel review of duty assessments against U.S. importers would be in violation of Article III.

Also, merely providing for judicial review of constitutional issues would not solve the problem for the questions raised in Customs litigation are judicial in nature[8] and their resolution by a non-judicial, non-United States body violates the tri-partiate nature of our Governmental system and denies to the importer citizen the protection afforded

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(cont.)

and an individual."

7. Washington International Insurance Co. v. United States, ___ CIT ___, F. Supp. ___, Slip Op. 88-4 (January 12, 1988).

8. See generally Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 7 L.Ed. 2d 761, reh'g. denied, 371 U.S. 854, 83 S. Ct. 14, 9 L.Ed. 2d 93 (1962).

by an impartial and independent judiciary.[9]

C. The Binational Panel Procedure Would Violate the Due Process Provisions of the U.S. Constitution

The Supreme Court has "traditionally" held that "the Due Process Clauses protect civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances". Logan v. Zimmerman Brush Co., 455 U.S. 422, 429, 71 L.Ed. 2d 265, 273 (1982).

The fact that a trial or hearing has been provided does not mean that due process has been completely satisfied. "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377, 28 L.Ed. 2d 113, 118 (1971).[10] This "opportunity" should be one which allows "for a hearing appropriate to the nature of the case" Id. 401 U.S. at 378, 28 L.Ed. 2d at 119 (quoting Mullane

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9. The Court in Northern Pipeline, supra was adamant on this subject (73 L.Ed. 2d 608):

> In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

10. The Court held that the refusal to permit indigent persons to bring divorce actions except on payment of court fees and service-of-process costs which they were unable to pay was a denial of due process.

v. Central Hanover Trust Co., 339 U.S. 306, 313, 94 L.Ed. 865, 873. (1950)).[11] However, "due process does not always require a full and formal adversary hearing." Ong v. Tovey, 552 F.2d 305, 307 (9th Cir. 1977).[12]

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332, 47 L.Ed. 2d 18, 31 (1976).[13] The Court in Mathews went on to state that when a property interest is concerned, "some form of hearing is required." Id. at 333, 47

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11. The Mullane case involved a New York statute which allowed trust companies "to pool small trust estates into one common fund for investment administration." 339 U.S. 306, 94 L.Ed. 865 (1949). The statute also provided for "notice to interested beneficiaries of a petition of such trust company for judicial settlement of its accounts by publication in a local newspaper, setting forth merely the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds". Id. The issue decided by the Court was whether the above notice satisfied the requirements of due process. The Court held that such method of notice did not satisfy due process as concerned the known beneficiaries of these trusts. Id. at 320, 94 L.Ed. 876.

12. Ong v. Tovey involved the termination of a resident physician from the Public Health Service (PHS) Hospital surgical residency program. The Court of Appeals for the Ninth Circuit held that where the resident physician in question has been afforded the opportunity to discuss his deficiencies "...at meetings at which he and his attorney had [the] opportunity to question the other doctors and decision makers about how they arrived at their decision and to present his side of the story . . ." due process was not violated. 552 F.2d 305.

13. The Mathews case concerned whether the "Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." 424 U.S. 323, 47 L.Ed. 2d 26. The Supreme Court responded that an evidentiary hearing was not necessary in that the existing administrative procedures under the Social Security Act fully satisfied due process. Id., 47 L.Ed. 2d at 25.

L.Ed. 2d at 32.[14] It should be noted that a cause of action has been held to be "a species of property protected by the Fourteenth Amendment's Due Process Clause." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 71 L.Ed. 2d 265, 273 (1982),[15] citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 94 L.Ed. 865 (1950).[16] The Court in Logan, supra, went on to state that: ". . . having made access to the courts an

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14. "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society'." Id., (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 95 L.Ed. 817 (1951)) (Frankfurter, J. concurring). (Termination of government employees due to membership in organizations designated either as "Communist" or "Subversive" without notice and a fair hearing is unconstitutional).

15. The issue in the Logan case was whether a cause of action could be terminated, if the termination was due to a failure to follow procedure on the part of a state official and not the plaintiff. The plaintiff in Logan filed charges against his employer with the Illinois Fair Employment Practices Commission for having unlawfully terminated the plaintiff's employment on the basis of the plaintiff's handicap. The Commission scheduled a "fact finding conference" 5 days after the statutory 120 days in whch they had to schedule such a conference. The Supreme Court held that the action could not be terminated as it would deprive the plaintiff of a protected property interest.

16. There are several cases which have held that there is a "Right of Access to Courts" which is a fundamental right protected by the Constitution. In Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983), the Court described this right as "basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." (Ryland involved a suit against state agents for having interfered with the plaintiff's right to institute wrongful death proceedings.) Bases for this right of access were also found in the First Amendment and the Due Process Clause. Id. at 972.

In Doe v. Schneider, 443 F. Supp. 780, 784 (D. Kan. 1978) (Action to enjoin state officers from destroying files containing information on the plaintiffs which had no lawful or valid purpose), the right to access to courts was described as a "concept which is nebulous at best." It was found by the District Court as most often finding its basis in the due process clause of the Fourteenth as well as Fifth Amendments as well as, in part, in the First Amendment. Id. The "right of access refers only to the right to petition the courts for redress of grievances" and not to obtain information to substantiate a claim. Id., at 787.

In Seoane v. Ortho Pharmaceuticals Inc., 660 F.2d 146, 151 (5th Cir. 1981), the Court of Appeals stated: "when a right is not fundamental, access to the courts may be restricted." Furthermore, "a party is not deprived of due process merely because it must seek administrative resolution of its claims before it has access to the courts." West Penn Power Company v. Train, 552 F.2d 302, 313 (3d. Cir. 1975) cert. denied, 426 U.S. 947, reh'g. denied, 429 U.S. 873 (1976).

entitlement or a necessity, the state may not deprive someone of that access unless the balance of state and private interests favors the government scheme." 455 U.S. at 430 n.5, 71 L.Ed. 2d at 274. Furthermore, "[w]hile the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Id. at 432, 71 L.Ed. 2d at 275, quoting from Vitek v. Jones, 445 U.S., at 490-491, n.6, 63 L.Ed. 2d 552,[17] quoting Arnett v. Kennedy, 416 U.S. at 167, 40 L.Ed. 2d 15, (opinion concurring in part).[18]

In Mathews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed. 2d 18, 33 (1976), the Court denominated a three point analysis in determining what due process "dictates":

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

While it is undoubtedly true that the amount of an importer's customs duty liability may initially be determined in an administrative proceeding such as that conducted by the ITA on Administrative Review, from the beginning of this Republic, and under the common law of England, an importer had the right to have the correctness of his duty assessments, and the decisions a part thereof, reviewed in a court of law by suits in assumpsit against the Collector or, subsequently, against the United States. The Dispute Settlement provisions attempt to deny that right to the importer and commit to a binational panel the power to interpret and apply United States domestic law and

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17. The involuntary transfer of a state prisoner to a state mental hospital without the benefits of notice and an adversary hearing violates the Due Process clause of the Fourteenth Amendment.

18. Discharge procedures for non-probational governmental employees did not violate the Fifth Amendment's procedural due process requirements although they failed to provide a "trial-type" hearing before the removal of the employee.

effectively set the importer's duty liability to the United States. The denial of a hearing on such a matter before an inferior court subject ultimately to review by the Supreme Court results, we believe, in the taking of an importer's property without due process of law.[19]

D. The Panel Cannot Be Justified Under Article II

It is impermissible for Congress to delegate important legislative power to an international forum like the binational panel, so the panel cannot be justified under Article II, assuming it would perform a legislative function like that of a typical "administrative court."

The reason for limiting delegations of power goes to the heart of our system of Government. Groups and organizations outside the Government are not politically responsible to the electorate, yet the Legislative Branch was always intended to be the most politically responsible Branch of Government. As explained by Professor Laurence Tribe in American Constitutional Law (1978) at 286:

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19. If it be deemed that the United States has simply withdrawn its consent to be sued in such matters, would that withdrawal then revive the common law right to sue the appropriate official? See Article VII of the Constitution preserving in common law suits the right to trial by jury. See also Washington International Insurance Co. v. United States, ___ CIT ___, F. Supp. _____, Slip Op. 88-4 (January 12, 1988) wherein in a 2-1 decision a three judge panel of the Court of International Trade held that in customs cases, an importer always has had, and has today, the Seventh Amendment right to trial by jury. In fact, an amicus in that case has filed a brief supporting the proposition that Customs cases are "at the core and heart of the judicial power under Article III"; that "[T]he Consitition itself provides that the government may not prohibit suits regarding the collection of customs duties"; and that the Customs Administrative Act of 1890, ch. 407, 26 Stat. 131, was unconstitutional "because it violated Article III by placing a core judicial function in an administrative agency [The Board of General Appraisers] and because it violated the Seventh Amendment trial by jury guarantee". See Brief of Amicus Curiae, Kalan Inc. filed March 4, 1988, in Washington International Insurance Company v. United States, Court No. 81-12-01678 (Court of International Trade).

> In general, limits on congressional capacity to delegate responsiblity derive from the implicit constitutional requirements of consensual government under law. Under any theory that finds legitimacy in the supposed consent of the governed within a framework of constitutional limitations, the cooperative exercise of accountable power presupposes the possibility of tracing every such exercise to a choice made by one of the "representative" branches, a choice for which someone can be held both politically and legally responsible.

Of course, the binational panel would vest important legislative authority in ad hoc groups of private individuals, some of whom — many times, a majority of whom — would not even be citizens of the United States. This blatantly would be inconsistent with the notion of political responsibility.

E. Adoption of The Binational Disputes Resolution Panel Would Result in Unequal Protection of the Laws

In the prior sections we have discussed briefly the denial of due process and the abrogation of the judicial power inherent in the Binational Disputes Resolution Panel as applied to ITC and ITA dumping and countervailing duty provisions. There we have emphasized the abridgement of the importer's rights because he is the one who is assessed additional duties where there is an affirmative dumping or countervailing duty determination. Further, the importer's right to contest any such assessment has a common law basis. We have not referred to the petitioners in those proceedings or interested parties because theirs are statutory rights which, while obtained after years of efforts, may be withdrawn by the Congress. However, the Congress here is not limiting those rights as to all petitioners (American manufacturers, producers, or wholesalers; labor unions; consumers, etc.,) but only as to petitioners complaining about certain merchandise - that is merchandise from Canada.[20] Thus an American company facing unfair competition from dumped or subsidized goods from Canada will not be able to receive the full protection of our laws with regard to such merchandise which a

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20. Although it is already assumed that similar limitations will be sought by Israel with regard to its FTA with the U.S., and by Mexico in its FTA negotiations.

competitor might be able to obtain on similar goods being dumped or subsidized from another country. Also an importer of merchandise from Canada would be denied judicial review of an ITA or ITC determination while a competitor importing similar merchandise from another country would have recourse to such review.[21] Another example of disparity would be where the ITA or ITC investigate a product which is imported from Canada and other countries. The final determination as to injury, which may well be a cumulative determination in these kinds of cases, would be bifuricated with the Canadian aspect going to the binational panel and the other country aspects to the courts of the United States.[22] We think it not only unequal but unworkable.

This disparity in treatment obviously raises questions as to the guarantee of equal protection of the laws contained in the 14th Amendment to the Constitution, the tenets

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21. A simple illustration of this is as follows: A and B are both in the business of importing product C. A imports product C from Canada. B imports product C from France. If B has any grievances over product C in reference to antidumping or countervailing duties, he will be able to seek redress for his grievances in the Court of International Trade simply because he imported product C from France. Since A imported product C from Canada, A will be precluded from asserting any similar claims in the Court of International Trade. Except for the origin of where they import product C from, A and B should be considered similarly situated.

22. See. e.g., Certain Fresh Cut Flowers from Canada, Chile, Columbia, Costa Rica, Ecuador, Israel, and the Netherlands, USITC Pub. 1956 (March 1987), at 15-20 (Imports of like flowers from all investigated countries cumulated); Certain Brass Sheet and Strip from Brazil, Canada and the Republic of Korea, USITC Pub. 1930 (Dec. 1986) at 12 (Imports from Canada, Brazil, France, Italy, S. Korea, Sweden, and West Germany cumulated); Oil Country Tubular Goods from Canada and Taiwan, USITC Pub. 1865 (June 1986) at 8 (Imports of OCTG from Canada cumulated with OCTG from Israel in the CVD case, and with Israel and Taiwan in the antidumping case); Iron Construction Castings from Canada, USITC Pub. 1811 (Feb. 1986) (Imports from Canada cumulated with those from Brazil, India, and the People's Republic of China).

of which have been implied into the guarantees of the Due Process Clause of the Fifth Amendment.[23]

III. What is Being "Protected" From Judicial Review Are Private Acts Not State Action.

A number of commentators in support of the FTA speak of the right of the President to conduct our foreign relations and of Congress to regulate foreign commerce and seek to clothe the deprivation of judicial review with these undeniable Executive and Legislative powers. But a close examination of the protection afforded by our dumping and countervailing duty laws is not protection from foreign states but protection from unfair competition by foreign exporters who sell their products to the United States at less than fair market value (i.e., the price at which the merchandise is sold in the home market) and are thus dumping their merchandise in the United States to the injury of American manufacturers, producers or wholesalers; or from foreign exporters who avail themselves of subsidies by their Government of a kind which are contrary to the Subsidies Agreement in the GATT and are injuring American manufacturers, producers or wholesalers, or, similarly in dumping cases, hindering the establishment of such American companies.[24] A dumping finding is directed at companies not countries! A countervailing duty investigation initially involves inquiries of a country as to the laws complained of, their general application, and the utilization of any suspect subsidies by particular exporters, but thereafter it is a question of whether and how much an exporter has availed itself of the subsidies.

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23. See Weinberger v. Wiesenfeld, 420 U.S. 636, 43 L.Ed. 2d 514 (1975) holding that the gender-based distinctions provided for by 42 USC §402(g) of the Social Security Act, which afforded less protection for the survival of female wage earners than for male wage earners, violate the right to equal protection of the laws under the due process clause of the Fifth Amendment.

24. See 19 U.S.C.A. 1671-1677.

Thus, there is no basis for contending that the binational dispute settlement panel can be defended on the ground of national sovereign interests. While it may be that Canada doesn't like our dumping and countervailing duty laws[25] to be applied to their products, until and unless those statutes are repealed they are a part of our national policy and are enforced on a case by case basis against imported merchandise whose exporters or manufacturers sell at dumped prices or at prices made uncompetitive because they have taken advantage of certain subsidies.

Certainly an importer or exporter should have the opportunity to show that there was no dumping under our laws or that his supplier was not dumping, or that the computation of the margin was arrived at not according to the statute. The failure to be able to do so leaves an importer without the ability to seek the judicial remedy historically available to him to contest what he believes to be an illegal exaction of duties. Likewise, the American petitioner should be able to show that a negative determination as to sales at less than fair market value or on injury was contrary to the statute.

IV. There is No Precedent for A Binational Panel Depriving A Citizen of a Suit Against the United States In The Application of Domestic Legislation

The proposed Binational Disputes Settlement Panel in the Canada-United States FTA is not only without precedent but is an effort to lessen the right of judicial review in the Customs area at the least, if not elsewhere. Even those who most desire the FTA (and this Association is not opposed to a free trade agreement with Canada), are concerned with the danger inherent in the adoption of such a device. For example, the International Trade Policy and the International Investment Committees of the National Association of Manufacturers in a Statement adopted on November 18, 1987, said "...NAM is concerned, as a matter of principle, about the adverse effect that the

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25. Although it has similar domestic legislation.

binational panels of the AD/CVD dispute settlement mechanism will have on U.S. sovereignty, on the administration of U.S. trade law and on the ability of U.S. petitioners to secure judicial review. We accept the proposal for these panels in the context of the Canadian agreement, but we would oppose extending the use of such panels or similar techniques to other trade agreements."

Frankly, we believe this right to judicial review, which was so easily and unnecessarily bargained away, is so essential a right that Congress should make it clear that its approval of the FTA is conditioned on the elimination of Chapter 19.[26]

Some proponents of the provision for the binational panel point to international claims and boundary commissions as precedent for the proposed action here. There is no legal or factual basis to that contention. Obtaining a fund from a foreign government to settle claims of our citizens against that government without recourse to our courts, as in Dames & Moore v. Regan, 453 U.S. 654 (1981), is not analogous to depriving an importer of the right to challenge an assessment of dumping or countervailing duties in our courts.[27] Under the doctrine of sovereign immunity, our courts have no power to

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26. It would seem that a possible alternative to the binational panel is a statutory preference for these cases setting out time limitations for hearing and decision in the CIT (after the filing of the administrative record) and in the appellate tribunals. Another possibility is the voluntary utilization of the panels on the agreement of all parties to it and to be bound by the panel's decision.

27. Dames & Moore v. Regan, 453 U.S. 654 (1981), involved an international tribunal established by the President to settle claims against the Iranian Government arising out of the hostage crisis. But that case is demonstrably inapposite here because it ultimately turned in substantial measure on the President's power to conduct foreign affairs. Thus, the Court quoted Judge Learned Hand from Ozanic v. United States, 188 F.2d 228, 231 (C A2, 1951), where Judge Hand had stated:

> The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies.

The Court further stressed that the President's settlement procedure:

> [was] determined [by the President] to be a necessary incident

grant relief in suits of our citizens against foreign governments. Even where there are assets of that government in the United States, they may not be attached unless they are a part of commercial activity not related to governmental functions and a claim of immunity is not recognized by the State Department or by the Courts.[28] Claims commissions are established to allocate amoung claimants a fund received from a foreign government.

The Foreign Claims Settlement Commission is also not a precedent because the Commission was disposing of, pursuant to international law, claims by U.S. citizens against former foreign (enemy) Government action which, if proven, were paid out of assets of the foreign Government. There have been numerous binational claims commissions in our history[29] but not one of them was depriving U.S. citizens from obtaining judicial review in instances where the U.S. Government was seeking to collect additional duties. Those were cases where our Government sought to assist our citizens

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(cont.)

to the resolution of a major foreign policy dispute ***.

The persistent theme of foreign affairs goes to the core of the holding in the case. The fact that the Court did not say this emphatically but engaged in an extensive analysis of statutes cannot detract from this conclusion.

Finally, Dames & Moore was decided on the narrowest of grounds, which is something the Court took pains to point out. See 453 U.S. at 660 and 688. This means that the case is unable to provide any sort of constitutional underpinning for an unprecedented institution like the U.S.-Canadian binational panel. Having to rely on Dames & Moore reveals the weakness of the proponents' position

28. See Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 48 L.Ed. 2d 301, 96 S.Ct. 1854 (1976), and cases cited therein; See also National City Bank v. Republic of China, 348 U.S. 356, 99 L.Ed. 389, 75 S.Ct. 423, reh'g. denied, 349 U.S. 913, 75 S.Ct. 598, 99 L.Ed. 1247 (1955).

29. American-Mexican, American-Turkish are but two examples.

in realizing their claims against foreign governments, claims which without our intervention might never have been honored.[30]

Likewise, the settlement of boundary disputes between nations by a binational Boundary Commission or the International Court of Justice is again not analogous. Such disputes are patently between nations and handled diplomatically or in international fora.

We are not aware of any precedent where the United States has statutorily agreed to force its citizens or those entitled to the protection of its laws to go to a binational panel to construe United States laws and Federal agencies' actions with the ultimate determination of those rights or obligations under United States statutes in that binational panel.[31]

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30. One proponent has also cited Berman v. Parker, 348 U.S. 26 (1954), the case involving the District of Columbia Redevelopment Act of 1945, 60 Stat. 790. According to that proponent, the Redevelopment Act involved a Congressional delegation of legislative power to a "private group," namely, the District of Columbia Redevelopment Land Agency. But the citation and argument are difficult to understand because the facts do not support the contention being made. As a careful review of the Act itself will reveal, the Redevelopment Land Agency was established by statute (see section 4) and funded by public funds (see section 16(b)). Moreover, two of its five members were appointed by the President, and the remaining three by the Board of Commissioners of the District of Columbia, with all appointments made subject to confirmation by the Senate (see section 4). Clearly, this was not a mere "private group", as the proponent of the panel would have one believe. Moreover, the Berman case is particularly inapposite because Congress has a special responsibility in the governing of the District of Columbia. Berman has obviously been cited inappropriately and does nothing to justify the bi-national panel — an institution which, incidentally, is not even remotely comparable to the Redevelopment Agency.

31. In fairness, it can be noted that an example exists of a narrow delegation of legislative power to a Tribe of American Indians. See United States v. Mazurie, 419 U.S. 544 (1975). The power delegated was the power to regulate the flow of liquour into Indian country. However, the delegation involved in Mazurie bears no resemblance to the binational panel, either on the facts or in fundamental footing. As for the latter, Congress and the American Indian Tribes have a highly complicated and exceptional relationship which is surely unique in American affairs. Canada is not in a comparable position; nor is a panel of private individuals established pursuant to an international agreement.

V. The Panel Cannot be Justified on Inherent Executive Powers

Finally, the panel cannot be justified on any power inherent in the Executive. Unlike the power to conduct foreign affairs, the power to impose customs duties and to regulate international trade is vested solely and squarely in Congress. See Article I, section 8. Accordingly, the Constitution provides no basis for the Executive to establish on its own an international institution empowered to exercise authority in those fields. To the contrary, the Executive can act in those areas only pursuant to a proper delegation of legislative power. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) ("The Steel Seizure Case"). It has already been demostrated in the discussions above that Congress cannot delegate legislative power to a delegatee like the binational panel; at the same time, the Executive cannot enter into international agreements that change the character of the United States Government. Accordingly, the binational panel cannot be justified under the Executive's powers under Article II.

CONCLUSION

The United States is being asked to turn a new corner, to travel down a new road but we do not think it should because of the barrier to that travel in the Constitutional guarantees of due process, equal protection and access to our courts. It is also bad policy and full of risks for the future.

The Customs and International Trade Bar Association, while recognizing that the Final Text permits non-governmental parties to be represented at binational panel proceedings and to force matters to be heard by those panels, and is thus an improvement over the prior version, finds that the denial of the right to judicial review in United States courts by an aggrieved party, if either the United States or Canada desires to

refer the matter to the binational panel, is repugnant to both the Constitution and to our national experience.

Respectfully submitted,

THE CUSTOMS AND INTERNATIONAL TRADE
BAR ASSOCIATION

By: _____

Andrew P. Vance
Chairman, Trial and Appellate
Practice Committee

March 8, 1988

National Governors' Association

John M. Sununu
Governor of New Hampshire
Chairman

Raymond C. Scheppach
Executive Director

H-7. U.S. - CANADIAN TRADE

The Governors support implementation of the Free Trade Agreement negotiated by the federal governments of the United States and Canada. Our support is contingent upon Canada and the U.S. doing nothing in the interim to violate the spirit of the explicit understanding affirmed in writing on January 2, 1988 to "exercise their discretion in the period prior to entry into force of the accord so as not to jeopardize the approval process or undermine the spirit and benefits of the Free Trade Agreement."

The agreement, while not fully addressing all issues relating to our bilateral trade, is expected to contribute to real growth in the economies of both signatories. It represents a positive step toward the open, competitive world trading system that we have endorsed. It provides for more timely and effective resolution of disputes between the two largest trading partners in the world.

Throughout the negotiations, the Office of the U.S. Trade Representative has sought our advice and made it a priority to keep us informed on progress. As the related legislation is developed and debated, we will continue to consult with the administration and Congress regarding its impact on state economies.

Emphasizing the importance of U.S. - Canadian relations, we will continue our meetings with the Canadian Premiers on issues of mutual interest, including options for greater trade cooperation between our two countries.

We believe that efforts should continue to be made to resolve those issues not fully addressed during the negotiations and that remaining inconsistencies with the General Agreement on Tariffs and Trade (GATT) rules should be vigorously pursued. We will work with Congress and the administration and within our states to minimize any adverse effects of the agreement.

The Governors have significant concerns about issues created or not fully resolved by the agreement and ask to be consulted as the implementing legislation or other measures are developed to ameliorate these problems.

The administration should enter into additional negotiations to address inequities regarding subsidies. Fair and open trade for all businesses requires resolution of the reality or perception of unequal treatment of certain industries due to differing national policies on subsidies.

Adopted February 1988.

Senator CONRAD. We also are going to be holding the record open for the next 2 weeks so that further questions and comments can be received. If you have a further comment, we would be happy to take that as well.

Mr. IKENSON. Thank you, Senator. I would make just one or two additional points. Ambassador Holmer indicated that the panel would have the advantage of expediting review and perhaps even making it less costly. But who is to enforce the timing requirements?

Senator, who is to enforce the timing requirements of the agreement? In other words, if the panel has to decide a case by a date certain, what if it does not? No court is looking over its shoulder. No court can. And the other point that I would make is that earlier I described the concept of cumulation where imports from several countries could come into the United States.

What happens when the International Trade Commission makes a determination that imports from Canada and three other countries are causing material injury to the United States, and the foreign interests wish to challenge that decision? Who will review the decision, and what decision will be reviewed? A decision has not been made with respect to Canadian imports into the United States but rather Canadian imports in conjunction with imports from other countries?

Should the decision be fractionated so that the Canadian portion of it is then reviewed by a panel, and the balance of the decision should be reviewed by a court? We see no solution to that.

So in other words, there are some real practical problems with the panel proposal as well as the more fundamental ones that I discussed earlier.

Senator CONRAD. Well, I again thank you for this testimony. I think it is extraordinarily important and highlights an area that the Congress needs to pay close attention to because it is not only important on its own merits, but is important in terms of the precedent it sets for the future.

I think you have brought into focus an issue that requires very serious thinking by the Congress. We are setting a precedent here that has serious implications for the country. When you start dealing with the fundamental structure of the Constitution of the United States, you are talking about a very serious matter.

In fact, I would question how we could alter the judicial structure of the United States absent a constitutional change. Again, I want to thank you for the testimony that you have provided, and to thank all witnesses.

I think this has been a very good hearing, certainly helpful to this member. With that, we will declare this hearing adjourned.

[Whereupon, at 12:30 p.m., the committee was adjourned subject to the call of the Chair.]

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